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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Dennis R. Patrick, Chairman

James H. Quello

Patricia Diaz Dennis

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Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 88-381

In the Matter of	)	
	)	CC Docket No. 88-2
Filing and Review of Open Network Architecture Plans	)	Phase I
	)	

MEMORANDUM OPINION AND ORDER

Adopted: November 17, 1988 Released: December 22, 1988

By the Commission:

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I. INTRODUCTION

1. On February 1, 1988, pursuant to the requirements of our Computer III proceeding,[1] the seven Bell Operating Companies (BOCs) filed Open Network Architecture (ONA) plans.[2] In this order, we approve the plans in substantial part, but identify a number of areas that must be revised. We require the BOCs to amend their plans by May 19, 1989, to augment their initial sets of ONA services,[3] to conform to tariffing requirements adopted in this order, and to supplement information on the technical specifications of network interfaces. By the same date we also require the BOCs to file amendments and information to improve their treatment of nonstructural safeguards, uniformity issues, the classification of ancillary services, and plans for future ONA services. We will invite public comment on those filings. Each BOC will remain subject to structural separation until it has obtained final Commission approval[4] of its plan amendments and implemented

---

1 Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 104 FCC 2d 958 (1986) (Phase I Order), modified on reconsideration, 2 FCC Rcd 3035 (1987) (Phase I Reconsideration), further reconsideration, 3 FCC Rcd 1135 (1988) (Phase I Further Reconsideration), second further reconsideration pending, appeals pending sub nom. California v. FCC, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28, 1987) and sub nom. Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). See also Report and Order, 2 FCC Rcd 3072 (Phase II Order), modified on reconsideration, 3 FCC Rcd 1150 (1988) (Phase II Reconsideration), further reconsideration pending, (pet. for rev. filed Apr. 20, 1988), California v. FCC, No. 88-7183 (9th Cir.) (pet. for rev. filed May 13, 1988) and Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988).

2 We address the ONA plan filed by the American Telephone and Telegraph Company (AT&T) in a separate order.

3 The term "ONA services" describes the basic services the BOCs will offer to satisfy our ONA requirements. While the Phase I Order described such services as Basic Service Elements (BSEs), some BOCs used a "common ONA model" that includes different categories of basic services that they call "BSEs," Basic Serving Arrangements (BSAs), and Complementary Network Services (CNSs). "ONA services" includes all of these. See Section IV below. Furthermore, some BOCs also include some basic services in a category of Ancillary Services or "other" services (ANSs). This order requires that ANSs be limited to unregulated services, and that basic, regulated services be reclassified as BSEs, BSAs, or CNSs. Accordingly, basic services that the BOCs now classify as ANSs are included in our references to "ONA services" as well.

4 Phase I Order, 104 FCC 2d at 1020, para. 115.

its ONA plan. However, pending our review of the amendments and supplemental information that we require in this order, the BOCs may continue to offer on an unseparated basis those enhanced services for which they have or obtain approved Comparably Efficient Interconnection (CEI) plans.

2. In devising ONA as a precondition to removal of structural separation for the enhanced service operations of the BOCs, we sought to establish a regulatory framework that would permit the BOCs to participate efficiently in the enhanced services market while preventing anticompetitive conduct based on BOC control of underlying, local communications networks. We found that while structural separation is one way to serve the goal of preventing anticompetitive conduct, it does so at significant cost by imposing inefficient restrictions on the ways the BOCs can develop, technically configure, and offer enhanced services to the public.[5] We also concluded in Computer III that another major goal of ONA should be to increase opportunities for all enhanced service providers (ESPs) to use the BOCs' regulated networks in highly efficient ways so that they can both expand their markets for their present services and develop new offerings that can better serve the American public.[6]

3. Our ONA unbundling and equal access requirements were refined in the course of the Computer III proceeding. However, we did not prescribe a specific network design for BOCs to implement. We believed that the better course would be to permit the BOCs, with input from the ESP industry and other interested parties, to propose implementations of the ONA requirements that matched the capabilities of their networks, both current and future, with the needs of the ESPs. Considerable inter-industry efforts among these various parties have contributed to the ONA development process. The BOCs filed their ONA plans on February 1, 1988. We invited interested parties to comment on

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5 We found that BOCs retain the incentive and the ability to discriminate against their competitors. Phase I Order, 104 FCC 2d at 1010-1013, paras. 96, 97, and 100. We have also concluded, however, that such activities can be adequately prevented by regulatory measures with substantially lower costs to the public than the costs caused by structural separation. Id. at 1012-1013, para. 100.

6 We reached these conclusions based in part on our analysis of the information and arguments advanced by the commenters in Computer III. See, e.g., the Phase I Order summary of the "Open Architecture" concept proposed by the Department of Justice, Ameritech, and others. Id. at 1060-1061, paras. 203-204, and 1063-1064, para. 212.

them, and we received 54 comments and 34 reply comments,[7] as well as several supplemental comments and replies.[8]

4. In requiring the BOCs' ONA plans to describe the unbundling of services useful to ESPs, we did not intend each ONA plan to be merely a collection of enhanced service-specific CEI plans. CEI, and the CEI parameters of the Phase I Order, are designed to prevent discrimination by the BOCs in the provision of specific enhanced services. We recognized that the telecommunications network, as it is currently designed, would require a number of quite different CEI implementations for different types of services, necessitating multiple, service-specific CEI plan reviews.[9] We viewed, and still view, ONA as involving more efficient network designs and tariffing practices that will make it possible to replace our service-by-service CEI regulation of BOC participation in enhanced services markets. We stated that properly designed ONA networks should be characterized by efficient interconnections and unbundled offerings that will limit a carrier's ability to engage in discrimination and be hospitable to the competitive offering of enhanced services.[10] Finally, at the beginning of the Computer III proceeding, we saw the deployment of certain advanced technologies as an integral part of ONA,[11] and we still consider the contributions of advanced technologies to be an essential part of ONA.[12]

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7 Parties filing formal comments, replies, and supplemental comments are listed in Appendix A. We use the abbreviations listed in that appendix throughout this order.

8 We accept all supplemental comments and responses as ex parte filings and dismiss all motions to strike these filings. Such ex parte filings are permitted under our rules in a non-restricted proceeding such as this. See 47 C.F.R. § 1.1206. We note that the parties filing such motions all had the opportunity to respond to the supplemental comments on a similar ex parte basis, and all of them did so.

9 Phase I Order, 104 FCC 2d at 1063, para. 210.

10 Id. at 1063-1064, paras. 210-212.

11 Id. at 1063-1064, para. 212.

12 We wish to clarify, however, that, as a number of parties to this proceeding correctly note, ONA is a public policy, not a prescription of a particular network architecture. Indeed, as a public policy, ONA should be "technology-neutral" -- that is, while it is implemented through particular network technologies, its principles do not depend on one or another such implementation. Rather, those principles can be applied to evolving network technologies as they develop. Of course, some technologies may permit the fuller realization of the goals of ONA than others.

5. We find that the BOCs' plans have laid a solid foundation for the design and construction of ONA. In our view, the BOCs have made substantial progress in achieving the goals of our ONA policies, and are planning further important progress between now and the implementation of the initial ONA services. However, while the plans represent a good first step, each ONA plan has certain deficiencies that require corrections before we can approve the plans for the purpose of eliminating the structural separation requirements.

6. This order provides further guidance on the proper implementation of our ONA requirements and describes the specific amendments that each BOC must make. Some plans are generally better than others,[13] but almost every plan excels in one or more discrete topics in ways that other plans should emulate. Conversely, every BOC can make improvements based on the strongest work of other BOCs. While all BOCs fall short in certain areas, notably in describing how ONA will evolve in light of new technological developments and in providing assurance that there will be a sufficient level of uniformity among the BOCs' ONA services, we are confident that, with the amendments that we require and the supplementary information that we request in this order, every BOC can provide the assurances, and make the specific commitments, that will satisfy our concerns and justify the removal of structural separation.

Summary of this Order

7. We approve the methods the BOCs have used to date to obtain ESP input in designing their ONA plans. For future input and further development of ONA, we find the Information Industry Liaison Committee (IILC) to be an appropriate inter-industry forum. We direct the BOCs to work through the IILC on a number of issues which require further inter-industry efforts.

8. We generally approve the use of the common ONA model offered by the BOCs. That model provides ESPs access to ONA services that the BOCs call BSEs through the BOC-provided access links that the BOCs call BSAs. We do not, at this time, require the kind of fundamental unbundling that would allow ESPs to connect their own trunks or loops to BOC switching facilities. We do require some reclassification of services the BOCs have provided in the various categories of their common model, and we clarify that our nondiscrimination rules apply to all ONA services regardless of their

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13 Ameritech and NYNEX, for example, come closest to realizing our regulatory goals for ONA. Their plans have some deficiencies, however, in areas such as future ONA evolution and uniformity.

classification. After examining the initial sets of ONA services proposed by the BOCs, we conclude that the BOCs have done a generally acceptable job of identifying initial ONA services that can feasibly be provided in the short term, using the existing capabilities of their networks. However, comparing the plans, it is not always clear why some BOCs have excluded services that others propose to offer. Accordingly, we direct the BOCs to examine each others' plans to determine whether they can augment their initial sets of ONA services.

9. We direct the BOCs to continue their work to achieve greater uniformity in the nomenclature, technical characteristics, availability, and deployment of ONA services. We recognize the contributions that the IILC has begun making on such issues, and we find that the IILC is a proper forum to address many uniformity issues. We direct the BOCs to work through the IILC on uniformity issues, and we require them to amend their plans to describe by May 19, 1989, their efforts and suggestions to achieve uniformity.

10. Because persons who provide interstate enhanced services should have the ability to obtain BSEs and BSAs through federal tariffs, we conclude that the BOCs should offer all interstate BSEs in the federal access tariffs to the degree technically possible. We also note that the existing interstate access tariffs describe access arrangements, such as the feature groups, that have many of the same functional characteristics as the BSAs proposed in the plans. We announce our intention to initiate a separate rulemaking to amend Part 69 of our rules to accommodate such federally-tariffed BSEs and BSAs. We maintain the existing exemption from federal access charges that applies to ESPs, and announce our intention to examine in our upcoming rulemaking different ways in which the exemption could operate in conjunction with the federal tariffing of ONA services required in this order. We approve the BOCs' proposals for the state tariffing of ONA services, but do not approve an ONA plan, like that of BellSouth, that deprives ESPs of their existing access arrangements.

11. We require the BOCs to extend the projected deployment schedules for their ONA services through July 1, 1992. BOCs must explain the manner in which they will offer advanced ONA services through new technologies such as Common Channel Signaling System #7 (CCS7),[14] Integrated Services Digital Network (ISDN),[15] and Intelligent Network/2 (IN/2).[16] We

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14 CCS7 is a technology that is compatible with, but not dependent upon, ISDN for conveying call set-up and related information through data channels that are separate from the channels that customarily carry voice signals or comparable information content.

15 ISDN is the acronym for the Integrated Services Digital Network concept and related technical standards. Among other things, telecommunications systems conforming to ISDN standards will eventually provide end users with

also require the BOCs to incorporate ESP input on these issues into their network planning processes. We ask the BOCs to provide geographic deployment schedules, where feasible, for advanced ONA services that BOCs will begin placing in service before July 1, 1992.

12. We require the BOCs to make certain changes in their implementation of our Customer Proprietary Network Information (CPNI) requirements. We permit most BOCs to file installation and maintenance reports in a simplified format, because those BOCs have provided us with adequate assurances that their internal procedures preclude discrimination in the timing of installation and maintenance of ONA and CEI services. We lift the quality reporting requirement for most BOCs, because most BOCs have demonstrated that they lack the ability to discriminate in the quality of their ONA/CEI services. We approve all of the BOCs' proposed treatment of network information disclosure.

13. We also establish a joint conference with state regulatory commissions from the seven BOC regions, pursuant to Section 410(b) of the Communications Act of 1934 (the Act), 47 U.S.C. § 410(b). This conference will be a forum for cooperation and coordination among this Commission and the states on specific ONA issues of common interest.

Future ONA Development

14. Despite the important progress that the BOCs have made so far, the completion of a plan that meets all of our ONA goals will not be a simple or mechanical process. Properly implemented, ONA will do more than prevent the BOCs from discriminating against their competitors in the provision of basic services that BOCs provide to their own ESP affiliates. In contrast to

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multiple digital channels over a single local loop capable of carrying data, digitized voice, or digitized images. With the "basic rate interface" end users will have simultaneous access to two "B" channels, each transmitting at 64 kilobits per second, and one "D" channel, transmitting at 16 kilobits per second. The D channel will carry call set-up data, such as the dialed number, and other signaling information, but may also be used for carrying additional information. See, e.g., SWBT Plan at 149.

16 Id. As the BOCs describe a fully developed "Intelligent Network," the deployment of new services and features would no longer require telephone companies to update each network switch on an individual basis with generic software provided, after a lengthy development process, by switch vendors. Instead, the BOCs hope that they will be able to define, develop, and customize their own network services through computers that modify and direct the operation of multiple switches on a remote basis. See, e.g., Ameritech ONA Plan at 115.

the service-specific "nondiscrimination" emphasis reflected in the interim CEI plans, ONA is the overall design of a carrier's basic network facilities and services to permit ESPs and others to interconnect efficiently to specific basic network functions, regardless of whether the carrier's enhanced services utilize those functions.[17] Thus ONA should not only ensure equal treatment of ESPs: it should promote efficient use of the network, both by the BOCs themselves and by unaffiliated ESPs.[18] This is, of course, one of the primary goals of the Communications Act.[19] Thus, ONA should serve the complementary goals of broadly preventing discrimination throughout a BOC's network and actively promoting the efficient provision of enhanced services.

15. We recognize that the design of an ONA plan that satisfies these goals is an inherently difficult process for the BOCs, made more complex by the necessity for careful coordination with ESPs to determine what kinds of services ESPs need, and with equipment and software vendors to determine when and at what cost those services can be provided. Moreover, on certain issues, coordination among the BOCs is both useful, because BOCs can benefit from each others' best insights, and necessary, because some of those ideas can be successfully realized only through interdependent effort by all or most of the BOCs with input from the ESP industry. The development of common nomenclature and uniform technical characteristics obviously require joint effort. Further progress in those areas is important to the success of national enhanced services. We recognize that conditions differ among and within the BOC regions, but it is also true that important scale economies can be realized if the BOCs move toward greater uniformity in the choice and deployment of ONA services. In the near term, the enhanced service industry can develop and market national offerings only to the extent that essential basic services are widely available. For the future, switching vendors can develop the necessary equipment and software for some advanced ONA services only if most of the BOCs reach agreement on the ways those needs should be met. Those tasks are complex and require coordination among diverse parties before final approval of the plans. Balancing these long-term concerns

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17 Phase I Order, 104 FCC 2d at 1019-1020, para. 113.

18 Phase I Reconsideration, 2 FCC Rcd at 3057, para. 156.

19 See MTS and WATS Market Structure, Third Report and Order, 93 FCC 2d 241 (1983), modified on further reconsideration, 97 FCC 2d 682 (1983), modified on further reconsideration, 97 FCC 2d 834 (1984), aff'd in principal part and remanded in part, National Ass'n of Regulatory Utility Comm'rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985), modified on further reconsideration, 99 FCC 2d 708 (1984), 101 FCC 2d 1222 (1985), aff'd on further reconsideration, 102 FCC 2d 849 (1985).

against our desire to see the BOCs implement ONA as rapidly as possible, we are establishing a filing deadline of May 19, 1989, for plan amendments.[20]

II. BACKGROUND

A. Phase I Order

16. We initiated the Computer III proceeding in the summer of 1985 to undertake a broad reexamination of the regulatory framework for enhanced services adopted in Computer II and related proceedings.[21] The Phase I Order concluded that, relative to nonstructural safeguards, structural separation requirements for the enhanced service operations of the BOCs and AT&T impose significant costs on the public in decreased efficiency and innovation that outweigh their benefit in limiting the ability of these carriers to engage in anticompetitive behavior. We retained, however, the two fundamental regulatory categories for telecommunications services established in Computer II: basic services, which are subject to common carrier regulation under Title II of the Act, and enhanced services, which are not subject to such regulation.[22]

17. The Phase I Order replaced structural separation for BOC and AT&T enhanced service operations with a set of nonstructural safeguards designed to prevent improper cost shifting in the provision of all unregulated services and to prevent discrimination by these carriers in their provision of enhanced services. We permitted the BOCs and AT&T to offer specific enhanced services on an unseparated basis pursuant to the CEI requirements established in that order. As a precondition to full structural relief for their entire enhanced services operations, we required the BOCs and AT&T to (a) implement

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20 As summarized more fully in Section XII below, we require the BOCs to amend and supplement their plans to identify additions to their initial sets of ONA services, provide lists of documents that describe the technical specifications of their network interfaces, describe future deployment and development of ONA services that will be made available after 1989, establish a process for receiving ESP input on the provision of ONA services through advanced network technologies, describe how the BOCs will implement certain nonstructural safeguards to conform with clarifications adopted in this order, restructure the terms for offering certain services that some BOCs classify as "ancillary" to ONA, and complete certain efforts toward greater uniformity of nomenclature and technical standards.

21 Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Notice of Proposed Rulemaking, FCC 85-397 (released August 16, 1985).

22 See Phase I Order, 104 FCC 2d at 968, para. 10.

approved ONA plans to be filed February 1, 1988; (b) file cost allocation plans in compliance with the requirements of the Joint Cost Order;[23] (c) adhere to modified versions of the existing network information disclosure requirements; (d) file nondiscrimination reports; and (e) follow procedures to protect CPNI.

18. In adopting the ONA requirement, we required the BOCs and AT&T to offer to ESPs a wide array of basic services that ESPs could use on an unbundled, equal access basis. We established nine CEI parameters that describe the important characteristics for which the BOCs must provide equal access to unaffiliated ESPs as well as their own enhanced service operations. We also established certain limited pricing requirements for such services. As importantly, we required the BOCs to meet with the enhanced service industry to determine industry needs for unbundled ONA services. As well as requiring the BOCs and AT&T to file ONA plans on February 1, 1988, describing their proposals for compliance with these rules, we also permitted these carriers to file interim "CEI plans" to offer individual enhanced services on an unseparated basis. Such CEI plans must demonstrate that these carriers will satisfy the "equal access" and pricing requirements for the specific unseparated enhanced services they offer.

B. Phase I Reconsideration

19. The Phase I Reconsideration addressed nine petitions for reconsideration of the Phase I Order. We revised the CEI/ONA requirements applicable to AT&T so that AT&T is not required to implement the type of general unbundling required in the Phase I Order for the BOCs' ONA plans, but may instead rely on service-specific CEI plans for its enhanced service offering.[24]

20. The Phase I Reconsideration clarified that BOCs need only address the requirements of ESPs in designing unbundled BSEs for ONA purposes. However, we stated that BSEs and CEI offerings tariffed at the federal level must be available to any customer for any use. We did not, however, preempt the states from imposing use restrictions on state-tariffed BSEs and CEI services, nor did we preempt pricing of intrastate services.[25] We reaffirmed

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23 Separation of Costs of Regulated Telephone Service From Costs of Nonregulated Activities, Report and Order, 2 FCC Rcd 1298 (1987), aff'd on reconsideration, 2 FCC Rcd 6283 (1987), further reconsideration pending.

24 Phase I Reconsideration, 2 FCC Rcd at 3042, para. 49.

25 However, we held that if intrastate tariffs for BSEs or CEI offerings do not fully comply with our CEI/ONA pricing requirements, carriers must seek waivers of the affected CEI pricing requirements. We also required the BOCs and AT&T to explain and justify any use or customer restrictions that appear

the requirement that the technical characteristics of a carrier's CEI offering must be equal to those of the basic services it uses for its own enhanced services.[26] We noted that this equal access standard remains "full technical equality," but that "equality as perceived by end users" is a key factor in fulfilling the standard.

21. The Phase I Reconsideration emphasized that ONA implementation is a long-term process. We stated that while we did not expect the BOCs to complete ONA implementation throughout their entire service area within one year, we declined to modify our requirement that an initial set of key BSEs be implemented within one year of approval of a carrier's ONA plan.[27] We further declined to alter the criteria we established in the Phase I Order -- market demand, utility as perceived by the ESP, and costing and technical feasibility -- for determining the initial set of key BSEs. We required that each BOC's ONA plan contain a schedule for the phased introduction of further ONA capabilities after implementation of the initial set of key BSEs, including a schedule for the deployment of the initial set of BSEs throughout a carrier's geographic service area.[28]

C. Phase I Further Reconsideration

22. The Phase I Further Reconsideration reaffirmed that our CEI/ONA pricing requirements do not mandate that distance-sensitive transport functions be priced differently for CEI/ONA purposes than the same or substantially identical functions are priced in generally applicable tariffs.[29] We also reaffirmed that the BOCs must minimize the transport costs incurred by other ESPs that connect with the BOCs' basic service facilities, but we clarified that multiplexing those connections to aggregate traffic is not the only acceptable cost-reduction technique.[30] Instead, a BOC may

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in their intrastate ONA tariffs.

26 Phase I Reconsideration, 2 FCC Rcd at 3048, para. 91.

27 Id. at 3056, para. 149.

28 We also decided that the preemption of state common carrier regulation of enhanced services that we adopted in Computer II should not be changed, and affirmed our actions in the Phase I Order preempting the states from imposing (a) separate subsidiary requirements on the enhanced service operations of AT&T and the BOCs, and (b) state nonstructural safeguards that are inconsistent with our Computer III safeguards. Id. at 3059-60, para. 173.

29 Phase I Further Reconsideration, 3 FCC Rcd at 1140-1141, paras. 43-46.

30 Id. at 1155, para. 32.

satisfy this requirement by charging the same transmission rates to all enhanced service providers, including its own enhanced service operations and those of noncollocated competitors.

23. We declined to eliminate our requirement that carriers request waivers if a state imposes terms or conditions on the carriers' intrastate BSEs or CEI offerings that are inconsistent with our CEI/ONA pricing requirements.[31] We said this waiver procedure demonstrates our willingness to be flexible in the face of potential conflicts with state authority.[32] We also declined to alter our requirement that carriers justify to us any use restrictions contained in state tariffs for BSEs.[33] We explained that, in our view, this requirement does not interfere with state authority to impose use restrictions, and it provides us with essential information we need to discover and evaluate potential conflicts between federal and state regulation.[34]

24. Finally, we stated that we expect the BOCs to make reasonably firm CEI/ONA scheduling projections.[35] However, for BOCs whose first ONA plans do not provide for deployment of their initial sets of BSEs throughout their territory, we clarified that those BOCs may submit, in addition to their initial schedules, updated plans in every subsequent year until complete deployment can appropriately be scheduled.[36]

D. Phase II Order

25. The Phase II Order addressed a number of significant issues concerning the definition of enhanced services and the scope of Computer III.[37] That order also adopted a set of nonstructural safeguards that the BOCs and AT&T must satisfy. First, we required AT&T and the BOCs to file quarterly nondiscrimination reports that provide comparative data on the timing of installation and maintenance, as well as the quality and

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31 Id. at 1143, para. 60.

32 Id.

33 Id. at 1144, para. 71.

34 Id.

35 Id. at 1145, para. 84.

36 Id.

37 For example, the Phase II Order reaffirmed our classification of protocol processing as an enhanced service.

reliability, of the basic services offered as part of any CEI/ONA tariff. Second, we established network information disclosure rules that require AT&T and the BOCs to inform enhanced service providers of new or modified network services. Third, we imposed CPNI obligations on the enhanced service operations of AT&T and the BOCs similar to those we imposed for AT&T CPE operations; AT&T and the BOCs may use CPNI for enhanced service marketing operations, provided that those carriers establish procedures to honor any requests from customers that their CPNI be withheld from carrier-affiliated enhanced service personnel or released to other enhanced service vendors.[38] We required AT&T and the BOCs to notify their multiline business customers of these rights on an annual basis. We also required the BOCs to provide any nonproprietary, aggregate CPNI that the BOCs provide to their own enhanced services personnel to unaffiliated enhanced service vendors.[39]

E. Phase II Reconsideration

26. The Phase II Reconsideration, among other things, eliminated the requirement that AT&T submit reports on the quality of the basic services that it provides as part of its CEI/ONA tariffs, provided that it (1) amends its ONA plan to include a detailed description of its installation procedures that demonstrates its inability to engage in quality-based discrimination, and (2) submits an annual affidavit attesting that it has followed the installation procedures described in its ONA plan amendments and that it has not, in fact, discriminated in the quality of network services used by competing enhanced service providers.[40] We concluded that the BOCs should be afforded the same opportunity to demonstrate that their procedures preclude such discrimination.[41] If they can do so, we held, the BOCs would also be relieved of the quality reporting requirement, subject to the same conditions applicable to AT&T.[42] We denied AT&T's request for permission to file installation and maintenance data only for its own enhanced service operations, but we modified our requirements to permit AT&T to file reports comparing installation and maintenance intervals provided to its own enhanced service operations with those provided to a sampling of all customers.[43] The

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38 Phase II Order, 2 FCC Rcd at 3095, paras. 154-55.

39 Id. at 3097, para. 174.

40 Phase II Reconsideration, 3 FCC Rcd at 1159, paras. 66-71.

41 Id. at 1160, para. 76.

42 Id.

43 Id. at 1161, para. 80.

Phase II Reconsideration did not modify the format for the BOCs' installation and maintenance reports, but we permitted each BOC to amend its ONA plan to include a detailed description of its installation and maintenance procedures that demonstrates that it lacks the ability to discriminate, and stated that we would modify this requirement, in the same way as for AT&T, for each BOC that makes such a demonstration.[44]

27. We declined to modify our CPNI rules to require that the BOCs' enhanced service personnel be denied access to CPNI absent prior authorization from customers.[45] We stated that we expected carriers to take special care to protect the CPNI of customers, especially ESPs, that request restricted treatment of their CPNI.[46] We also required AT&T and the BOCs to amend their ONA plans to describe the types of information that they will treat as CPNI.[47] We added a number of provisions to our CPNI rules to facilitate users' ability to limit access to their CPNI, including a requirement that each CPNI notice to multiline business customers include a response form that customers may use to inform the carrier of their preferred CPNI treatment.[48] We also declined to relieve the BOCs of the requirement that they make nonproprietary, aggregate CPNI available to unaffiliated enhanced service providers.[49]

28. Finally, we declined to modify our network disclosure requirements to reduce the amount of advance notice that BOCs must give before initiating a new or modified network service that will affect the interconnection of enhanced services with the network.[50]

F. Orders Approving CEI Plans and Waiver Requests

29. On the same day that we adopted the Phase I Further Reconsideration and the Phase II Reconsideration, we approved two service-specific CEI plans filed by BOCs to provide enhanced services to be collocated

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44 Id. at 1161, para. 84.

45 Id. at 1162, para. 96. No petitioner asked us to require that AT&T's use of CPNI be restricted absent prior authorization from its customers. Id. at 1169, n. 15.

46 Id. at 1163, para. 99.

47 Id.

48 Id. at 1163, para. 105.

49 Id. at 1164, para. 114.

50 Id. at 1165, para. 120.

and integrated with their basic services. Those plans provided CEI to competing enhanced services seeking to use those BOCs' basic services.[51] The Bureau, acting under delegated authority, has approved five additional CEI plans[52] and issued three waivers allowing BOCs and AT&T to provide specific enhanced services on a collocated or otherwise integrated basis.[53] Four of the ten CEI orders have authorized BOCs to provide voice message storage (VMS) services that enable subscribers to receive and originate and distribute messages using voice storage equipment collocated with the carriers' basic service facilities.[54] The remaining six orders approved proposals for the

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51 Bell Atlantic Offer of Comparably Efficient Interconnection to Providers of Voice Messaging Services, Memorandum Opinion and Order, 3 FCC Rcd 1108 (1988) (Bell Atlantic CEI Plan for Public Announcement Voice Messaging Service); Pacific Bell and Nevada Bell Plan for the Provision of Voice Mail Services, Memorandum Opinion and Order, 3 FCC Rcd 1095 (1988) (Pacific CEI Plan for Voice Messaging Service).

52 American Telephone & Telegraph Plan for the Provision of Transaction Services, Memorandum Opinion and Order, 3 FCC Rcd 2702 (1988) (AT&T CEI Plan for Transaction Services); AT&T Plan for the Provision of Codec Conversion Services, Memorandum Opinion and Order, 3 FCC Rcd 4683 (1988) (AT&T CEI Plan for Codec Conversion Service); Southwestern Bell Telephone Company Comparably Efficient Interconnection Plan for the Provision of Voice Messaging Services, Memorandum Opinion and Order, DA 88-1469 (released September 29, 1988) (SWBT CEI Plan for VMS); Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Voice Messaging Services, Memorandum Opinion and Order, 3 FCC Rcd 5772 (1988) (Bell Atlantic CEI Plan for Personal VMS); Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Gateway Services, Memorandum Opinion and Order, 3 FCC Rcd 6045 (1988) (Bell Atlantic CEI Plan for Gateway Services).

53 Petition of AT&T for Waiver of CEI Requirements of Third Computer Inquiry, Memorandum Opinion and Order, 2 FCC Rcd 6723 (1987) (AT&T Subaccount Billing Waiver); Bell Atlantic Telephone Companies Petition for Waiver of CEI Requirements to Perform Technical Trials of Coin Messaging Services, Memorandum Opinion and Order, 3 FCC Rcd 5741 (1988) (Bell Atlantic Coin Messaging Waiver); New England Telephone and Telegraph Company Technical Trial of Asynchronous to X.25 Protocol Conversion, Memorandum Opinion and Order, DA 88-1550 (released Oct. 5, 1988) (New England Telephone Protocol Conversion Waiver).

54 Bell Atlantic CEI Plan for Public Announcement Voice Messaging Service, supra; Pacific CEI Plan for Voice Messaging Service, supra; SWBT CEI Plan for VMS, supra; Bell Atlantic CEI Plan for Personal VMS, supra.

collocated provision of two computer communications gateway services,[55] subaccount billing,[56] transaction processing,[57] codec conversion,[58] and time-delayed message transmission from coin-operated telephones.[59] Several other CEI plans are pending.[60]

III. INDUSTRY INPUT

A. Background

30. In initially describing the broad structure and specific requirements of ONA, we stated that we would "not adopt or approve any of the commenters' network architecture proposals" at that time, but that we would "specify certain standards that ... carriers' Open Network Architecture Plans must meet."[61] We declined to initiate a separate proceeding to develop specific ONA designs, but found "that this process most appropriately should occur in the private sector, where interested parties can participate in the development of Open Network Architectures that are suited to specific enhanced and basic service markets."[62] The Phase I Order established fundamental

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55 See Bell Atlantic CEI Plan for Gateway Services, supra note 52; New England Telephone Protocol Conversion Waiver, supra note 53.

56 AT&T Subaccount Billing Waiver, supra.

57 AT&T CEI Plan for Transaction Services, supra.

58 AT&T CEI Plan for Codec Conversion, supra.

59 New England Telephone Protocol Conversion Waiver, supra.

60 The Modified Final Judgment (the MFJ), the antitrust consent decree which compelled AT&T to divest the BOCs, originally prohibited the BOCs from offering any "information services," a class of services that apparently is similar to enhanced services. United States v. AT&T, 552 F.Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983). On March 7, 1988, the U.S. District Court for the District of Columbia that oversees the MFJ (the MFJ Court) issued an order removing that restriction for certain types of information services for which the BOCs subsequently filed CEI plans. U.S. v. Western Electric Co., Inc., No. 82-0192 (D.D.C. filed Mar. 7, 1988) (March 7 Order).

61 Phase I Order, 104 FCC 2d at 1064, para. 213.

62 Id. at 1067, para. 219.

guidelines for the carriers to follow in establishing their versions of ONA.[63] That order required the BOCs to offer BSEs, which we defined as "unbundled basic service 'building blocks'".[64] To commence the ONA process, we urged that "representatives of the carriers' enhanced and basic service operations meet with enhanced services competitors prior to the filing of the [ONA] Plans, in industry standards organizations or in other forums, and establish an appropriate initial set of... [BSEs]."[65]

B. Development of Industry Inputs

1. National and Regional Forums

31. After release of the Phase I Order on June 16, 1986, the BOCs and Bellcore began obtaining industry inputs for ONA planning and the selection of the BOCs' initial BSEs. Bellcore sponsored two national Open Network Architecture Forums: in Reston, Virginia on October 28-29, 1986 (ONAF-1), and in Los Angeles on March 31-April 2, 1987 (ONAF-2). Attendance at these forums was open to all interested parties and included, in addition to ESPs, representatives of independent telephone companies, interexchange carriers, manufacturers, user groups, and state governments.

32. At the forums, BOC representatives presented their preliminary approaches to developing ONA. Members of the enhanced service industry were offered the opportunity to present views of ONA at these plenary sessions and in sessions that were organized according to the various ESP industry sectors.[66] BOC representatives attended each sector session. In addition to these national forums, the individual BOCs continued obtaining industry inputs to their ONA Plan development efforts. Each BOC held regional forums, which were supplemented by in-house and contracted market research studies. During this period, the BOCs identified additional BSEs and obtained more detailed information concerning potential ESP customer attitudes in the individual BOC regions.

2. BOC/Bellcore Special Reports

33. At the conclusion of the regional forum process, the seven BOCs formed a National ONA Ad Hoc Committee (Ad Hoc Committee) to synthesize the

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63 See id. at 1064-1066, paras. 214-217.

64 Id. at 1064, para. 214.

65 Id.

66 E.g., value added networks (VANs), telephone answering and messaging services, information services, and alarm services.

industry inputs. That effort culminated in the issuance of a list of 157 ONA capability requests. The Ad Hoc Committee expected that list to serve as a common starting point in the national ONA planning process. The Ad Hoc Committee then disbanded itself and became superseded by a Technical Advisory Group (TAG), consisting of representatives from each BOC, which produced four ONA Special Reports with Bellcore's cooperation. The BOCs used the ONA Special Reports for internal planning and also released them to the public.

34. Report No. 1[67] tabulates 118 requests for Network Capabilities (NCs)[68] that the TAG derived from the initial list of 157 capabilities compiled by the Ad Hoc Committee.[69] For each NC, the report: (a) provides a standardized name; (b) describes the major operational features in a general sense; and (c) states the manner in which an ESP could use the requested capability. Report No. 2[70] describes the manner in which Bellcore, at the request of the BOCs, develops and proposes generic requirements for stored program controlled switches for use by any BOC or its regional affiliate. The purpose of this report, apparently, is to inform the enhanced service industry about the necessary processes for introducing new BSE capabilities into existing and new switch designs.

35. Report No. 3[71] analyzes each of the 118 NCs tabulated and described in Report No. 1 in terms of whether it is technically feasible to implement that NC in the three most common switches used by the BOCs: the AT&T 1AESS and 5ESS, and the Northern Telecom DMS 100F. The BOCs also issue

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67 BOC ONA Special Report No. 1, Issue 2, Enhanced Service Provider Request for Network Capabilities (Oct. 1987).

68 "Network Capability" is a locution introduced by the BOCs in this proceeding. It subsumes, in addition to BSEs, other tariffed services, as well as untariffed services, such as billing and collection and protocol conversion. "Network Capability" is further defined in Sec. IV, A, infra, (The ONA Model, Description of Model).

69 The original list of 157 requests contained 39 requests that were deemed by the TAG not to have the BSE characteristics described in the Phase I Order. The TAG eliminated non-technical requests, such as billing and collection, and unregulated services, such as protocol conversion. The TAG construed the remaining 118 to be technical requests for network capabilities that could be used as a common starting point for ONA planning.

70 BOC ONA Special Report No. 2, Bellcore's Generic Requirements Process (October 1987).

71 BOC ONA Special Report No.3, Technical Analysis Report, Enhanced Service Provider Request for Network Capabilities (October 1987).

a disclaimer, stating that the technical feasibility of a given NC "does not necessarily signify that it will be a BOC offering."[72] Appendix 2 of Report No. 3 lists the dates by which the various switch vendors' generic programs will be available.

36. Report No. 4[73] defines a "common ONA model," developed by the BOCs, which adopts a standardized nomenclature for the various components and features of the network architecture. The BOCs developed the model to "facilitate the discussions among industry members as BOC ONA Plans are prepared. [The model] will be useful to the ongoing planning for future ONA services."[74]

3. Individual BOC Activities

37. The BOC plans describe BOC participation in the national and regional forum planning processes as well as internal BOC market research activities.[75] Ameritech states that it initiated region-specific data gathering activities by engaging an independent communications consulting firm to conduct a research study to establish quantitative estimates of demand for an early list of BSE candidates.[76] However, Ameritech states that there was a general lack of knowledge regarding ONA concepts among those surveyed. Ameritech claims that the study's main value was in providing qualitative information on the network capabilities desired by various industry segments under ONA, the ESP's perceptions of pricing and competitiveness, and some indication of marketplace demand for various network services.

38. To obtain further input for its ONA plan, Ameritech states that it conducted a number of customer interviews. In addition, in June 1987, Ameritech hosted a regional ONA forum. According to Ameritech, approximately 125 industry members representing national and regional firms attended. In

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72 Transmittal letter, from Bell Operating Companies to the ONAF Participants, Oct. 26, 1987.

73 BOC Special Report No. 4, Common ONA Model (November 11, 1987).

74 Transmittal Letter, from Bell Operating Companies to ONAF participants, Nov. 11, 1987.

75 See Ameritech Plan at 22-25, Appendixes 1-2, B; Bell Atlantic Plan at 14-16, Appendixes, A, C-E; BellSouth Plan at 15-26, Att. D-K; NYNEX Plan at 35-43, Appendix C; US West Plan at 24-28, Appendix F; SWBT Plan at 28, 37-40, Appendix 26; US West Plan at 30-47.

76 See Ameritech Plan at 17-21, and Appendices 1-2.

January 1988, Ameritech hosted a second regional ONA "Plan Preview" meeting to familiarize the approximately 100 attendees with its plan.

39. Bell Atlantic states that it has contacted ESPs through regional forums, personal contacts, and correspondence. It supplemented these contacts with "two comprehensive primary market research studies to assess the level of market demand for potential new basic services at specific price test points."[77] Shooshan and Jackson, consultants for Bell Atlantic, conducted workshops and interviews among potential ESP customers, and LINK resources conducted telephone interview to assess potential demand. Bell Atlantic says it correlated the totality of these data with specific segments of the ESP industry.

40. BellSouth states that it conducted two regional workshops that were focused on enhanced service providers in its service area. A workshop held in the spring of 1987 attracted 43 non-BellSouth attendees, it says, and the second workshop held in the fall of 1987 had 42 such attendees.[78] BellSouth states that it sent representatives to all enhanced service provider industry association meetings that were open to BOC participation,[79] and that it directly contacted a number of enhanced service providers.[80]

41. NYNEX describes its ONA Market Outreach Process, which is intended to communicate with existing and potential ESPs to determine their business needs.[81] To this end, NYNEX states that it gathered experts from a variety of organizations within NYNEX as well as outside NYNEX and used data from a variety of sources, including the public record in Computer III, the Huber Report,[82] and a study performed by an outside consultant, Booz-Allen and

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77 Bell Atlantic Plan at 14. See also id. at 14-16, App. A.

78 Id. at 20-21. Summaries of those meetings and copies of viewgraphs show that BellSouth provided information on a number of specific BSEs that it was considering for possible implementation. Attachment H, "BellSouth Regional Open Network Architecture Workshop 1," and Attachment I, "BellSouth Regional Open Network Architecture Workshop 2."

79 Id. at 22. BellSouth provides a list of the 16 ONA meetings that its personnel attended in Attachment J.

80 Id. at 22-23, citing Attachment K. Attachment K itself does not purport to list parties contacted by BellSouth; it lists 15 parties from whom BellSouth claims to have received written opinions concerning ONA and whose input it says it considered during the development of its ONA plan.

81 See NYNEX Plan at 36-43, App. A.

82 The Geodesic Network - 1987 Report on Competition in the Telephone

Hamilton. NYNEX states that its Outreach effort focused on the ESP market segments that most extensively utilized network facilities in the ESPs' delivery of services. NYNEX held two regional forums, in May and November 1987, with key industry leaders and major industry associations to determine the needs of ESP customers. NYNEX says that at these meetings it described its commitment to the national ONA model and made a preliminary commitment to new ONA services.

42. NYNEX also reports that it: (a) held a series of forums within the company to inform its personnel of the Outreach Process; (b) considered all of the ESP requests that were identified in the other BOC forums in an effort to develop national uniformity; (c) participated in a broad range of ONA related conferences, trade association meetings, seminars, and other BOC forums throughout the United States; and (d) developed a media campaign to reach ESPs and potential ESPs.

43. US West states that, after release of the Phase I Order, the early stages of dialogue between the BOCs and the enhanced service providers were, for the most part, unfulfilling for both sides, but that communication improved over time.[83] US West states that at the first ONA forum, ONAF1, the ESPs produced long lists of desired network capabilities, some of which were difficult to understand,[84] but that the ESPs also clearly stated their desire for more information about the way the network functions and for more involvement in the agenda-setting process in future industry dialogue.[85] Since that time US West says that it and the other BOCs have worked on issues of national uniformity with the participation of the ESPs. US West cites the creation of the IILC as an example of such BOC efforts.[86]

44. In addition to its participation in national forums, US West reports that it has conducted its own forums with the enhanced services industry in order to focus more narrowly on its specific ONA planning

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Industry (prepared by Peter W. Huber as a consultant to the Department of Justice in accordance with the court's decision in U.S. v. Western Electric Company, 552 F. Supp. 131, 194-95 (D.D.C. 1982)). January 1987.

83 See US West Comments at 24.

84 As examples of difficult-to-understand requests, US West cites "3-6 dB loss correction," "management functions/control," and "access to signaling functions." Id.

85 Id.

86 Id. at 26.

process.[87] US West conducted two planning forums in 1987 that were followed by two regional forums. The first planning forum, held in February in Phoenix, resulted in the identification of several issues for future resolution. The second, held in March in Denver, concentrated on the technical development of an Open Network Architecture.

45. US West states that it used input from its planning forums to formulate the agenda of its initial regional US West ONA Forum held in April 1987, in Phoenix. At this forum, US West gave its customers an overview of its ONA position, highlighted its emerging technical design of ONA, and allowed discussion of customers' needs, wants, and concerns. US West used the input received during this forum to develop BSE candidates. At the second US West forum, held in October 1987, in Scottsdale, Arizona, US West presented its position on ONA issues with ESPs and held smaller sessions with subgroups of ESPs to facilitate the exchange of views. US West then produced a Market Information Packet outlining its ONA positions, which it distributed to forum participants.

46. SWBT states that it has: (a) participated in ONAF-1 and ONAF-2; (b) hosted a national ONA workshop in St. Louis; and (c) conducted one-on-one meetings with ESPs, large end users, and industry associations. It notes that it has collected industry inputs through different processes: primary research, secondary research, ESP/end user input, meetings with state public utilities commission (PUC) staffs, and trials.[88] In addition, SWBT has formed a new Information Industry Marketing group to work with ESPs in determining their needs.

4. Positions of the Parties

47. Most other parties did not comment on the manner in which the BOCs and Bellcore conducted the industry input process prior to the filing of the plans.[89] Some ESPs and end users, however, describe their own activities in contributing to the industry input process. Some note their participation in the ONAF and regional forums.[90] Others describe their

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87 See US West Comments at 32-38.

88 See SWBT Plan at 37-42. SWBT states that "[a]ll of the written input received ... from ESPs is available for review at SWBT's Washington, D.C. offices, except for those materials which ESPs submitted under an assertion of confidential status." Id. at 41.

89 ADCU objects only to the introduction by the BOCs of the Common ONA Model in November 1987, claiming that industry was unable to contribute inputs because of the lateness of that date. ADCU Comments at 28.

90 ADAPSO Comments at 3; AICC-Ameritech Comments at 2-3; API Comments at

own consultant studies and forums. For example, ANPA organized an ONA advisory group on print publishing and hired a consultant to develop specialized requirements,[91] and ADT and ATSI organized forums to develop needs for the alarm and telephone answering sectors respectively.[92]

5. Discussion

48. The BOCs' efforts to obtain industry input concerning ONA services and the ONA plans demonstrate a substantial commitment of time, resources, and energy to the ONA process. Furthermore, participation by ESPs and other interested parties in the ONA forums and meetings with the BOCs prior to the filing of the plans has helped define both opportunities and competitive concerns that are important to the implementation and further development of ONA.[93]

C. Continuing Industry Input

49. The present vehicle for joint effort and communication on ONA among private parties is the IILC, which the Exchange Carriers Standards Association (ECSA)[94] established in 1987 "to serve as an inter industry mechanism for the discussion and voluntary resolution of industry-wide concerns about the provision of [ONA] services and related matters." The IILC's goal is to "strive to obtain industry consensus on issues associated with the provision of ONA services".[95] The IILC, which is addressing

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2-3.

91 ANPA Comments at 3.

92 See ADT Comments at 3-4; ATSI Comments at 2.

93 We recognize that this participation by ESPs and others has also required a substantial investment of time, resources, and energy from a large number of parties. We commend these efforts, which have contributed substantially to the ONA development process to date, and we urge these parties to continue this commitment in future stages of ONA development and implementation.

94 ECSA is an association voluntarily established in 1983 by members of the wireline exchange carrier industry to address technical interconnection standards and other technical issues following the AT&T divestiture.

95 IILC Bylaws at 1. ECSA also sponsors the T1 Committee, which develops some national telecommunications standards, and the Carrier Liaison Committee, which addresses issues involving interconnection of LECs and IXCs.

technical and uniformity issues, consists of LECs, ESPs, IXCs, large users, and manufacturers. It has met frequently since its creation.

1. The Need for an Ongoing Industry Forum

50. Many ONA commenters agree that this Commission should enlist the aid of an outside forum in which interested parties could resolve ONA issues.[96] We favor the resolution of certain ONA issues in industry forums. Many ONA issues involve technical considerations that can best be addressed by industry experts with the resources and incentives to resolve them.[97] We believe that an outside forum can also be a useful tool for resolving differences between parties. In fact, as discussed below, forums such as the IILC have already achieved important progress on ONA initiatives. Finally, we are committed to allowing marketplace considerations drive the ONA process where practical, and to avoiding intrusive regulation. An industry forum, with its particular sensitivity to marketplace conditions, can readily incorporate these considerations into debates on such ONA issues as technical uniformity and future network development.

2. Industry Forum

a. Positions of the Parties

51. All of the BOCs, some ESPs, and others support the IILC as the industry forum for ONA issues.[98] NTIA and others, however, express reservations about the IILC and propose that this Commission establish another body that "fairly represents the views of all different industry segments".[99] NTIA states that this Commission should have oversight of this body, and

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96 ADAPSO Comments at 62; ADT Comments at 10; Ameritech Reply at 27; ANPA Reply at 3; Arizona Comments at 7; ATSI Reply at 5; Bell Atlantic Reply at 24; BellSouth Reply at 45; California Comments at 4; CONAP Comments at 39; CONAP Reply at 3; CBEMA Comments at 27; IDCMA Comments at 14-15; Ameritech States Comments at 16; Missouri Reply at 4; New York Reply at 2-3; NTIA Comments at 13; NTIA Reply at 17-19; Noam Comments at 15; NYNEX Reply at 83; Pactel Reply at 5-6; Siemens Comments at 10; SWBT Reply at 48; Telocator Reply at 4; Videotex Reply at 17; US West Reply at 57.

97 See Shooshan & Jackson Reply at 38.

98 See, e.g., Ameritech Reply at 27; Bell Atlantic Reply at 24-25; BellSouth Reply at 8; NYNEX Reply at 83; Pactel Reply at 30-32; SWBT Reply at 48; US West Reply at 57; ADT Comments at 10; Siemens Comments at 11.

99 NTIA Comments at 22.

advocates "non-governmental" mediation to address impasses.[100] The primary justification for this proposal is a concern among parties that IILC is dominated by carrier interests.[101]

b. Discussion

(i) The IILC

52. We believe that the IILC's work in ONA is useful and should continue. The IILC adequately addresses the stated needs of the parties as an industry forum for ONA issues. The IILC recently adopted bylaws and procedures that reflect a commitment to fair representation of all industry segments. All meetings are open to the public,[102] and decisions are reached through "consensus". Although the IILC Chairperson is an ECSA member, one ECSA member and one non-ECSA member co-chair all IILC committees and sub-committees. The Interindustry Advisory Group (IAG),[103] the IILC's executive arm, has nine seats divided among LECs, IXCs, ESPs, manufacturers, and end users, and is also co-chaired by one ECSA and one non-ECSA member.

53. The IILC has already produced a number of documents addressing uniformity issues. Two examples, discussed below, are the Reference Document, which cross-references all ONA offerings included in the BOC plans, and an analysis of Calling Number Identification (CNI), which provides a review of the different ways CNI can be provided, both with current and future network technology, and of the propriety of implementing a uniform technical application of that feature. Moreover, the IILC has successfully formulated and implemented bylaws and procedures that appear to provide for equitable representation of, and participation by, the various interested parties. These efforts required considerable time and resources of both LECs and non-LECs and a new forum would have to duplicate these efforts. Because IILC

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100 Id.

101 ANPA Reply at 4; ATSI Reply at 5; ICA Reply at 4; IDCMA Comments at 14; New York Reply at 5; Teolocator Reply at 4.

102 Id. at 2.

103 The IAG provides staff support to the Chairperson by reviewing recommendations of various working committees, establishing agendas for full IILC meetings, nominating co-moderators for standing committees, and monitoring the progress of working committees. Working Committees and Task Forces perform specific investigations and report to the Chairperson and the IAG. At present, there are two Working Committees, the Technical Working Committee and the Non-Technical Working Committee.

appears to be functioning well, we believe that it is the proper forum to address and, to the extent possible, resolve uniformity issues.

(ii) Neutral Inter-Industry Entity

54. We believe the IILC is successfully accommodating the varying industry groups concerned with ONA. Thus, the IILC itself appears to be adequately serving the function that some parties would assign to another industry forum. We are sensitive, however, to the concerns expressed by non-LEC parties about potential carrier domination of the IILC. While the new bylaws and procedures of the organization adequately respond to those concerns and the actual operation of the IILC indicates it has not been dominated by carriers or others, we will continue to monitor the workings of the IILC. We will take appropriate action if it diverges from the equitable and open processes that have characterized its operations thus far.[104] Moreover, a new forum, unlike the IILC, would be an unknown quantity with no established procedures or record of achievement. At best, establishing a new forum would take several months. A new forum would have to address the same issues that the IILC has already resolved (bylaws, organizational structure, officers, schedules, agenda, etc.). Even then, there would be no guarantee that the end product would be an improvement over the IILC product. Accordingly, we decline to establish a new forum in place of the IILC.

3. The Role of this Commission in the IILC

55. A number of parties urge this Commission to take a more active role in whatever industry forum addresses ONA issues such as uniformity. Commenters suggest that we provide specific guidelines for the operation of the forum,[105] mediate differences, or resolve disputes.[106] We agree that it is appropriate for us to provide some guidance to the IILC process. In other sections of this order we provide specific direction regarding the types of issues that the BOCs, through the IILC, should address to comply with the ONA requirements. Furthermore, the numerous substantive decisions we reach in this order should also facilitate the inter-industry process by sharpening the rules that will govern ONA development and deployment and focusing IILC efforts on those areas that require further inter-industry effort. We do not believe, however, that a formal Commission role in mediation or dispute

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104 Staff members of the Common Carrier Bureau regularly attend IILC meetings. Furthermore, IILC written documents, including its bylaws and other governing documents, minutes of meetings, and technical reports, are reviewed by Bureau staff and have been included in the record of this proceeding.

105 Dun & Bradstreet Comments at 5; NTIA Comments at 3.

106 CBEMA Comments at 26-27; Dun & Bradstreet Comments at 5.

resolution within the IILC is currently advisable. The IILC has already made progress on a number of technical and operational concerns without direct Commission involvement. Accordingly, we believe that our proper role at this time is to continue to send Bureau staff to attend IILC meetings when possible and to monitor IILC progress in resolving these issues.[107] Of course, the work of IILC should be reflected in the revised BOC ONA plans, both on those issues successfully resolved and those that remain subject to dispute; and the Bureau's review of these plan amendments, aided by the public comments we receive, will provide an opportunity for considering the results of the IILC's work.

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107 CBEMA urges us to take a more active role by establishing an ONA Task Force in the Bureau with delegated authority to resolve ONA-related conflicts. CBEMA Comments at 26-27. As noted above, we see no need for this type of dispute resolution role at this time.

IV. THE ONA MODEL

A. Description of Model

56. As a basis for describing the unbundling of basic services proposed in their ONA plans, the BOCs, in collaboration with Bellcore, devised a "common ONA model" that represents the functional means through which an ESP would interconnect with a BOC's network.[108] As described in the BOCs' Report No. 4, the common ONA model is based upon the architecture of the existing BOC local distribution networks, from which unbundled BSEs and other features may be offered to the public. As noted above, the model consists essentially of BSAs, BSEs, CNSs, and ANSs.[109] BSAs are the fundamental tariffed switching and transport services that allow an ESP to communicate with its customers through the BOC network. Under the common ONA model, an ESP and its customers must obtain some form of BSA in order to access the network functionalities that an ESP needs to offer its specific services. Examples of BSAs include line-side and trunk-side circuit-switched service, line-side and trunk-side packet-switched service, and various grades of local private line service.

57. BSEs are optional unbundled features (such as Calling Number Identification) that an ESP may require or find useful in configuring an enhanced service. CNSs are optional unbundled basic service features (such as stutter dial tone) that an end user may obtain from a carrier in order to access or to receive an enhanced service.[110] ANSs are other services that the BOCs say fall outside of the ONA construct, but which may be useful to ESPs. ANSs could include enhanced services offered by the carrier, such as protocol conversion, or other deregulated, non-common-carrier services, such as billing and collection. Furthermore, some BOCs include a number of regulated, basic services in this category.

58. In Appendix B, we describe how each BOC used the common ONA model in developing its Plan. In the following sections we examine various

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108 See Bell Operating Companies, ONA Special Report No. 4, Common ONA Model (Nov. 1987) (Report No. 4).

109 See id. at 1-2.

110 Features that the BOCs describe as BSEs and CNSs are generally resident in the stored-program-controlled switch located in a carrier's end office. Specially written generic software packages in the switch make these functionalities available to ESPs and end users.

issues raised by the BOCs' use of this model to comply with our ONA unbundling and antidiscrimination requirements.[111]

B. Fundamental Unbundling Issues

1. Positions of the Parties

59. Some commenters contend that the BOCs are using the common ONA model to bundle services improperly. Such commenters claim that by adopting the model, the BOCs attempt to avoid meeting the unbundling requirements of the Phase I Order by not undertaking to disaggregate communications facilities and services on an element-by-element basis. In particular, commenters say that the BSAs themselves contain sub-elements that could be unbundled further. For example, commenters claim that trunks could be unbundled from the circuit-switched, trunk-side BSA, so that ESPs would be able to connect their own trunks to BOC switches. Hatfield, in particular, comments extensively on this aspect of the common ONA model and proposes its own model, which, it claims is built on "natural modules."[112]

60. Hatfield claims that, by introducing the BSA, the common ONA model destroys the very heart of the ONA unbundling concept as articulated in Computer III.[113] In particular, Hatfield says that the BOCs wrongly assume that all access arrangements existing today cannot be divided into their sub-elements. Thus, says Hatfield, the BOCs have attempted to move the unbundling concept from the arena of basic network elements, that include facilities such as loops, as well as switching functions, inter-office transmission, and signaling, to a set of merely software-defined switching features. Hatfield contends that ONA calls for a more fundamental type of unbundling to support the needs of the ESP industry. Accordingly, it urges us to mandate a more far-reaching form of ONA, rather than relying on the voluntary process.[114]

61. Hatfield argues that an "open" architecture is one that allows or even encourages the use of other vendors' equipment, devices, software, or services in conjunction with the BOC network. Hatfield says that this can be accomplished by creating natural modules in the system, physically and

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111 In Section VII we discuss uniformity issues associated with classification of ONA services.

112 See Hatfield Comments 9-59. Hatfield's comments, filed in the form of a report, are sponsored by Telenet, CompuServe, Dun & Bradstreet, CBEMA, and IDCMA.

113 Id. at vi.

114 Hatfield Comments at 111.

logically interconnected at well-specified interfaces.[115] Hatfield then identifies what it terms natural "building blocks" of existing exchange networks and their corresponding interfaces.[116] Hatfield emphasizes that the building blocks and interfaces that it identifies are described in standard reference books and professional articles, as well as the major technical references on the architecture of the local network published by Bellcore. Hatfield proposes that these "natural building blocks" be made available on an unbundled basis and adds that mandatory collocation is critical to this proposal to allow ESPs to gain access to network interfaces in a meaningful way.

62. Other parties criticize the common ONA model, claiming, among other things, that the model ignores: (a) technologies such as CCS7 and ISDN; (b) the existence of "natural" building blocks within the network; and (c) concepts based upon distributed architectures, such as FN/SI or IN/2.[117] According to API, the BSA concept is not consonant with the premise that ONA is intended to reduce the network to essential BSE building blocks.[118] BSAs, it says, are highly packaged, end-to-end service arrangements in which switching, signaling, and transmission are not disaggregated. API says that the BSA concept is a creation of the BOCs -- it is neither a linchpin nor even an afterthought of the Computer III orders. ADCU agrees, saying that

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115 Id. at iv.

116 For example, Hatfield states that the existing local exchange network is composed of the distribution network, local switching systems, and interoffice facilities. Hatfield examines each of these parts in order to identify and describe the elements upon which they are built. The distribution network, it says, includes elements or "building blocks" that include a feeder plant and a distribution plant. Corresponding natural interface points are at the subscriber main distributing frame, the serving area interface, and the point of termination at the customer's location. Id. at 23-26. It examines other such building blocks and interface points within central offices and the interoffice portion of the network. See id. at 28-31.

117 See ADAPSO Comments at 24-25; CBEMA Comments at 12-20; CONAP Comments at 5-16; DEC Comments at 18-19; ESC Comments at 23-29; NOAM Comments at 7.

118 API Comments at 7. See also CBEMA Comments at 6-12; CCTU Comments at 8; CompuServe Comments at 15-18; CONAP Comments at 16, 21; ESC Comments at 6; Hatfield Comments at 60-69; IBM Comments 9; ICA Comments at 6; TCG Comments at 8-16; Tymnet Comments at 48-49, 76; Indiana Reply at 9-11; NTIA Reply at 10.

the BSA concept defies the Commission's unbundling requirements.[119] The only unbundled "elements" in the plans, says ADCU, are supplemental features and functions that are optional. ADCU requests that we direct the BOCs to develop an ONA model that is compatible with the goals of Computer III.

63. MCI states that the ONA model is inconsistent with the representations made by the BOCs in the Computer III proceeding as to the manner in which the exchange network could be unbundled into its "elemental" or "primitive" components. MCI says that the BOC model imposes an artificial segmentation of the exchange network. According to MCI, despite the fact that access, switching, and transport functions are all physically and functionally segregable, the BOCs have bundled them together in the form of BSAs. MCI states that the BOCs have unilaterally decided to limit their unbundling activities to a discrete set of software-defined central office switching features that they consider to be "optional" services.[120] Similarly, Noam says that by establishing BSAs, the BOCs side-step an important part of unbundling, and only unbundle the "bells and whistles," not the "meat and potatoes," of local service.[121]

64. Shooshan & Jackson criticizes Hatfield's proposal for more fundamental unbundling. It disputes Hatfield's contention that the ONA model is inadequate because it is not sufficiently unbundled, technologically advanced, or uniform in its network offerings. It argues that the sponsors of Hatfield's comments have a vested interest in delaying the introduction of ONA in order to forestall the increased competition in enhanced services that will result when the BOCs are free to enter the marketplace.[122] It also contends that Hatfield's arguments are "grounded on a concept of ONA that is not Commission policy," adding that Hatfield dwells on some issues, primarily collocation, that have already been decided.[123]

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119 ADCU Comments at 10.

120 MCI Reply at 3-5.

121 Noam Comments at 11.

122 Shooshan & Jackson Reply at 16.

123 See id. at 44, quoting Phase I Order at 1037, para. 151:

> We recognize that collocation is a possible way of fulfilling the goals of our equal access standards for CEI. However, we decline to mandate that carriers provide collocation opportunities for other enhanced service providers.

65. Shooshan & Jackson says that Hatfield, in attempting to justify its view of unbundling, mischaracterizes the Phase I Order by omitting three specific Commission-provided examples of typical, unbundled network capabilities: (1) "trunk side interconnections," (2) "calling signal identification," and (3) "separate channel signaling."[124] Shooshan & Jackson argues that all of the BOCs are offering to provide the first two capabilities and that "separate channel signaling" will be offered when the new CCS7 technology becomes fully deployed.

66. SWBT offers three reasons for not unbundling BSAs at this time. First, SWBT claims that the unbundling of BSAs into their underlying facilities and functions would require immediate, extensive modifications to the public switched network. Specifically, it says that such unbundling would cause software problems since stored program control switch generics handle, in addition to BSEs, all three components of the BSAs: access, features and functions, and transport.[125] SWBT adds that further unbundling would dismantle the "infrastructure" of uniform core services that the MFJ court has held is essential to development of information services.[126] Second, SWBT says, such unbundling would require "collocation,"[127] which, under our policies, is not mandatory.[128] Third, SWBT asserts that the unbundling of BSAs would permit ESPs to compete with providers of regulated local services without being subject to state jurisdiction. According to SWBT, this would divert profits from the provision of local exchange service and leave LECs with the burden of maintaining below-cost universal service. The ESPs, it says, would be free to purchase only the barest form of working basic service without regard for the operation of the network as a whole.[129]

67. US West also raises the spectre of ESPs becoming competitive providers of local service, saying that the unbundling of BSAs would require shifts in federal and state regulatory policies in order to avoid rate

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124 Id. at 41-42. See Phase I Order, 104 FCC 2d at 1019-1020, para. 113.

125 SWBT Reply at 21. SWBT says that it is doubtful that the infant ESP industry could sustain the expense of such disaggregation.

126 SWBT states that such a requirement would inhibit its ability to offer the two most requested circuit switched BSEs, CNI and Customer Alerting. Id. at 23.

127 In this context, SWBT apparently refers to the interconnection of customers' transmission facilities on BOC premises as "collocation."

128 SWBT Reply at 18-19.

129 Id. at 19-21.

increases for those who are now subsidized.[130] In response to arguments in favor of more-innovative network architectures, US West states that its current plan is a first step, but that it will not radically restructure its network in the near future since such a restructuring cannot be resolved with finality in a Commission ruling. US West also argues that the extensive unbundling requested by some parties is not feasible at this time.[131]

68. Supporting the common ONA model, Siemens states that the ONA plans display the appropriate level of unbundling.[132] According to Siemens, the ONA service elements proposed by the BOCs are small enough to provide for flexible utility to the ESP community, but not so small as to introduce unnecessary costs to public networks that could unnecessarily depress the emerging ESP industry and perhaps jeopardize the utility of public networks for basic service provision.

2. Discussion

69. The Phase I Order did not contemplate that the initial ONA offerings would produce the fundamental restructuring of the networks that Hatfield and others support. It did not discuss as "unbundling" the kind of mandated interconnection on carriers' premises of facilities owned by others that such parties advocate. It emphasized the unbundling of basic services, not the substitution of underlying facilities in a carrier's network. Indeed, in describing the initial sets of ONA services that the BOCs must provide, the Phase I Order states our expectation that this initial set would contain unbundled basic service functions that could be used in the provision of enhanced services "to the extent technologically feasible."[133] It also notes that inefficiencies could occur from unnecessarily unbundled or splintered services,[134] and cites various ensembles of network services, not facilities, as examples of the unbundling expected from the BOCs.[135] Although we did not

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130 See US West Reply at 101-102.

131 Id. at 100.

132 Siemens Comments at 12.

133 Phase I Order, 104 FCC 2d at 1065, para. 216.

134 Id. at para. 217.

135 According to the Phase I Order:

> These [unbundled]components, such as trunk-side interconnections, may utilize subcomponents that themselves are offered on an unbundled basis, such as separate channel signaling and called or calling signal

require or specify the "common ONA model" in the course of the Computer III proceeding, the unbundled ONA services the BOCs developed using that model are consistent with those examples. Indeed, in discussing the initial ONA services, the Phase I Reconsideration stated that these services would be a "necessary [ONA] milestone ... rather than a requirement for introduction of a massive and possibly inefficient new architecture in areas where it is neither necessary nor desirable."[136]

70. While more fundamental unbundling could be a socially desirable goal, we do not believe that it would be in the public interest for this Commission to require such a development at this time. To require the BOCs to provide ONA based on a more disaggregated, and as yet unspecified, architecture would be extremely costly and disruptive of the schedule that we have established for ONA implementation. The BSA/BSE concept of the common ONA model, which achieves BSE unbundling through the mechanism of software changes in end-office SPC switches, recognizes the realities of the current architecture, and is more likely to bring new features to ESPs at a faster rate, and with less investment, than would a radical reconfiguration to a more modularized architecture.

71. Although some commenters argue that, even within the parameters of the common ONA model, BSAs could be further unbundled,[137] we agree that such unbundling could potentially present technical or operational difficulties, and involve at least a type of mandatory collocation, which we have not required. Moreover, as SWBT notes, more fundamental unbundling of BSAs than presently advocated by the BOCs, could raise issues regarding competition in the provision of local basic service and universal service that we see no need to address at this time, particularly because the level of unbundling proposed in the plans is, generally speaking, adequate for an initial implementation of ONA.[138]

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identification.

Id. at 1020, para. 113; 1040, para. 158 n. 215.

136 Phase I Reconsideration, 2 FCC Rcd at 3055, para. 142.

137 Some parties also claim that the BOCs use the common ONA model to bundle BSEs with BSAs, so that the availabilty of optional BSEs is tied to a customer's purchase of a particular BSA, which, depending on the ONA plan, may only be available under a particular tariff. We address this bundling issue and its ramifications for proposed BOC tariffing practices in Section IX below.

138 Many parties supporting further unbundling of BSAs seek to interconnect their facilities directly with the end office switch and provide the transmission from the carrier to the end user rather than use a

72. While we do not agree with those parties that contend that the BOCs' plans are defective and should be rejected for not providing the further unbundling discussed above, we do not foreclose consideration of these issues at a later time. We recognize that the type of extensive unbundling advocated by Hatfield and others could, in the long term, have certain positive pro-competitive effects in the enhanced services market as technology and regulatory policies evolve. Such unbundling would also present significant policy and regulatory issues which should be confronted if and when the technical and operational problems are resolved. While various regulatory concerns also underlie these unbundling issues, we think that the best way to proceed initially is for the IILC to examine these technical and operational problems and assess their scope and possible solutions. We are asking the IILC to perform a number of "inter-industry" tasks associated with the ONA process. We recommend that the IILC turn its attention to this matter after it has made substantial progress on the other issues that we ask it to consider in this order.

C. Regulatory Implications of the Common ONA Model

1. BSAs and BSEs

a. Positions of the Parties

73. Several commenters claim that the BOCs have failed to commit themselves to the principle that ONA safeguards must apply to all necessary or useful network elements. These commenters question whether the BOCs, in characterizing network elements as something other than BSEs, intend to avoid compliance with the ONA regulatory requirements. For example, IBM claims that the competitive safeguards that replaced structural separation, such as technical equal access, nondiscriminatory installation and repair, and the resale requirement, should be equally applied to all network elements of the model and not just BSEs.[139] ADAPSO states that any interpretation of ONA as permitting the BOCs to distinguish BSAs from BSEs would effectively remove the most important service elements of the local exchange from the nonstructural safeguards of ONA.[140]

74. Similarly, Tymnet says that we must prevent BOCs from stripping ONA safeguards away from essential services merely through arbitrary

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carrier-provided local loop.

139 IBM Comments at 11.

140 ADAPSO Comments at 21. See also NTIA Comments at 28.

classifications.[141] NTIA adds that the current ONA model, with its various associated components, makes the plans lengthier, more complex, and possibly subject to more contention than necessary.[142] The BOC replies do not address the basis for their creation of the BSA service category.

b. Discussion

75. As noted above, the Computer III orders do not describe the various categories of unbundled basic "building blocks" that the BOCs have created in the common ONA model. Our orders spoke only in terms of unbundled services that we called BSEs. We required the BOCs to offer these services pursuant to the equal access provisions of our CEI rules because ESPs need these services to provide enhanced services. The fact that, according to our formulation of ONA, the ESPs need such services for their offerings implies that the offerings must be subject to our safeguards in order to prevent discrimination by the BOCs. The BOCs both control the availability of these services and use these services to compete in the enhanced services market.

76. Because the services the BOCs call BSAs are essential links between ESPs and the BOCs' network, as the BOCs stress in their plans, BSAs are necessary for the delivery of enhanced services and thus are the type of elemental "building blocks" that we described as "BSEs" in our Computer III orders. As such, BSAs should be subject to the regulatory treatment described in the Computer III orders for "BSEs". Indeed, in one of our orders, we used the phrase "basic service arrangements". Specifically, the Phase I Reconsideration stated that:

> We also affirm the process established in the Phase I Order for reviewing amendments to ONA plans that include the introduction of new BSEs or new basic service arrangements for offering a carrier's enhanced services.[143]

77. However, as that text makes obvious, there is nothing that indicates that a BSA should be distinguished from a BSE for purposes of

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141 Tymnet Comments at 52-53. See also ATSI Comments at 19-21; ADCU Comments at 13-14.

142 NTIA Comments at 28-29. NTIA urges us to streamline the model, saying that we could greatly simplify the ONA process by clearly indicating which services or service elements belong in an ONA plan, which are to be classified as BSEs, and which fall outside the intended scope of ONA.

143 Phase I Reconsideration at 3045, para. 64, n. 118.

applying the Computer III safeguards. If anything, the language appears to equate the two. Despite the differing names chosen by the BOCs, both BSAs and BSEs are essential basic service building blocks of a truly open network architecture and thus both are subject to our ONA rules.

78. Accordingly, we require the BOCs to amend their plans by May 19, 1989, to state explicitly that they will offer their BSEs and BSAs in compliance with our rules for BSEs.[144] Such amendments should not be burdensome. While some BOCs fail to detail the general applicability of our rules to BSEs and BSAs, most appear to recognize that all Computer III rules will apply to both.[145]

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144 As discussed in the preceding section, this does not mean that the BOCs must "unbundle" BSAs into switching and transport (or other) components. See supra paras. 69-72.

145 NYNEX proposes a BSE that includes a gateway service as a means for customers with computers and modems to access a wide variety of electronic information services through packet switched BSAs. See NYNEX Plan at 33; NYNEX Reply at Appendix B. NYNEX has been offering this gateway service on a limited trial basis in certain of its areas pursuant to a waiver of our CEI requirements granted by the Bureau. See New England Telephone and Telegraph Company Technical Trial of Asynchronous to X.25 Protocol Conversion, Memorandum Opinion and Order, DA 88-1550 (released Oct. 5, 1988) (the Technical Trial Order). The regulatory status of such a service has been the subject of some controversy. Compare Bell Atlantic Telephone Companies, Offer of Comparably Efficient Interconnection to Providers of Gateway Services, Memorandum Opinion and Order, DA 88-1512 (released Sept. 30, 1988) with the Technical Trial Order. However, we do not rule on this issue at this time.

We believe that we should make such a precedential ruling only in the context of a substantially more complete record on this issue. Accordingly, we require NYNEX to file, prior to the conclusion of its current gateway trial, either a CEI plan for its gateway service or a petition for declaratory ruling describing in detail the technical, legal, and policy reasons for classifying its gateway service as basic. Other BOCs that desire to offer a gateway service before our decision on this issue must conform to these requirements as well. Pending our action on such a plan or petition, as an interim measure, NYNEX may continue to offer this service pursuant to the Technical Trial Order until we take further action on the status of its gateway service.

2. Complementary Network Services

a. Positions of the Parties

79. Tymnet urges us to require the BOCs to satisfy the ONA requirements when providing CNSs.[146] Tymnet says that it is not convinced that BOCs will be able to provide CNSs to customers of competing ESPs without distorting the competitive marketplace that we sought to preserve by adopting ONA as a regulatory safeguard. According to Tymnet, a BOC employee will have no incentive to maintain the requisite neutrality when discussing enhanced services with its regular telephone customers. Thus, it argues, if we do not protect CNSs through ONA's safeguards, the BOCs will have a competitive advantage resulting from their control of the local network that is precisely the type of advantage that ONA was designed to prevent.[147]

80. NTIA says that the CNS category represents functions available to customers of ESPs, but not necessarily to the ESPs themselves and that the creation of such a category represents an unwarranted use restriction.[148] Indeed, NTIA says that there is no reason to complicate ONA further by the creation of CNSs (or ancillary services), since the BOCs have not consistently treated identical network functions as falling in the same category.[149]

81. Pactel replies that the class of services it calls CNSs are essentially all of the services it offers to end users and explains that they are "complementary" to the ONA model because such services give end users access to the network -- both for regular telephone service and in order to reach ESPs.[150] However, Pactel emphasizes that CNSs are not designed solely to meet an ESP's needs, and thus need not be offered as BSEs. Under our rules, it argues, BSEs are designed "only to address the needs of ESPs."[151] Ameritech says it would not be proper to disturb the present treatment of CNSs as items available in state tariffs, because doing so would result in the minority of

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146 Tymnet Comments at 52-56. See also ATSI Comments at 19-20.

147 Tymnet Comments at 55.

148 NTIA Reply at 10-11.

149 Id. at 11 n. 11.

150 Pactel Reply at 13.

151 Id. Pactel says that it will offer a few CNSs, such as Call Forwarding - Busy Line/Don't Answer to ESPs as BSEs. When this happens, Pactel indicates that it will file tariffs with price decreases available through bulk purchasing options.

enhanced service applications dictating the treatment and pricing of the majority of other applications.[152]

82. SWBT indicates that it will permit ESPs to purchase CNSs for their customers only if the ESPs obtain written authorization from those customers. Commenters object to this arrangement, saying that it also confers an unfair advantage on SWBT because SWBT could provide its customers with "one-stop shopping" for both enhanced and basic services without similar authorization.[153] SWBT argues that the authorization is necessary to prevent the technical problems that could occur if, for example, an ESP ordered CNSs to be activated on an end-user's line without the approval of the end user, thereby "causing complications with or perhaps even interruptions of the end user's use of other enhanced services or basic exchange telephone service."[154]

b. Discussion

83. As described by the BOCs, CNSs have two principal characteristics. First, CNSs are associated with end users', rather than ESPs', access arrangements. Second, CNSs are locally tariffed, basic services that the BOCs will offer to end users whether or not such users are customers of ESPs -- that is, such services give end users access to the network for a variety of applications, not merely enhanced service applications.

84. We did not direct the BOCs to create this class of basic services under ONA. However, we see no need to prohibit use of the CNS category by any BOC so long as we can be assured, as in the case of BSAs, that adequate safeguards exist to protect against potential discrimination in the delivery of CNSs to ESP customers. Indeed, it may even be of some benefit to retain a category of services that organizes network capabilities for end users and provides them a measure of flexibility in choosing such capabilities with their enhanced services.[155]

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152 Ameritech Reply at 19.

153 ADAPSO Comments at 23-24. See also Hatfield Comments at 66-67.

154 SWBT Plan at 25.

155 For example, end users may wish to purchase a network capability for occasional or casual use with an enhanced service that is not offered by an ESP as part of a "packaged" enhanced service. The CNS category would allow end users flexibility to choose such capability to suit their needs irrespective of a standard ESP offering that might not include such capability.

85. The BOCs must, of course, provide CNSs on a nondiscriminatory basis -- that is, since the BOCs provide CNSs as basic services to end users, the BOCs cannot favor their own enhanced service customers in any way in the provision of CNSs. Current BOC practices regarding CNSs satisfy this requirement. Because the BOCs provide CNSs to all end users pursuant to tariff for purposes other than simply to facilitate provision of an enhanced service, the potential for any discriminatory behavior by the BOCs in offering such services is speculative. Moreover, the BOCs' standardized ordering and provisioning systems for providing basic services to end users provide still more assurance that the BOCs will not be able to discriminate against end users who purchase CNSs for use with a competing ESP's enhanced services. Thus, at this time, it is not necessary to extend further ONA requirements over such currently offered, end-user services.[156] There is no need to extend such requirements to CNSs not yet tariffed by the BOCs so long as the BOCs offer them on a nondiscriminatory basis like other end-user services.

86. Although different BOCs variously classify some services or functionalities as BSEs or CNSs,[157] we conclude that, the BOCs' service classifications should not have different practical consequences for federal tariffing purposes. As discussed below,[158] we require the BOCs to provide BSEs within our interstate access tariff framework. We conclude here that such unbundled BSEs should include all basic services that satisfy our three "BSE selection" criteria regardless of whether the BOCs now classify such services as BSEs or CNSs.[159] We refer to such services as "interstate BSEs." Thus,

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156 The Phase I Further Reconsideration noted that "traditional 'exchange' features" like call forwarding and call waiting often are tariffed with states on a flat-rated, monthly basis, and concluded that if the BOCs were to take such services for their enhanced service operations at the same tariffed rates as their competitors, the pricing for these services would not conflict with our ONA pricing requirements. 3 FCC Rcd at 1148, n. 93. While that order characterized such services as "BSEs," some plans describe these services as CNSs, and we believe that this analysis applies equally well for CNSs.

157 Indeed, CNSs and BSEs are sometimes indistinguishable. For example, while Ameritech, Pactel and SWBT label the service "call forward busy line/don't answer" as a CNS, Bell Atlantic, BellSouth, NYNEX and US West all consider this same service to be a BSE. It is possible that the same feature/function could be in both categories in a BOC's plan -- as a CNS when offered to an end user over an ordinary subscriber line and as a BSE when offered to an enhanced service provider with a BSA.

158 See infra paras. 278-280.

159 This requirement will apply as well to any basic services now in the ANS category that the BOCs reclassify, pursuant to our direction, as BSEs or CNSs. See infra paras. 106-107.

if an ESP takes an interstate access arrangement (e.g., a feature group) for access to a BOC's network, any interstate BSEs that are technically compatible with that access arrangement must be unbundled in its federal tariff.[160] Accordingly, for federal tariffing purposes, there is no separate service category of CNSs (a result that is consistent with the definition of CNSs in the common model as state-tariffed services.)[161]

87. Finally, parties object to SWBT's proposal to permit ESPs to purchase CNSs for their customers only if the ESPs obtain written authorization from those customers, claim that this gives SWBT an unfair marketing advantage. Although SWBT gives technical reasons for this arrangement, it is not evident how the written authorization SWBT would require, by itself, would prevent such technical problems.[162] Moreover, SWBT is not entirely clear whether it intends to exempt its enhanced service affiliate from obtaining its customers' written authorization to purchase CNSs for them. SWBT does not explain why its affiliate should be so exempted, if this is what it intends.[163] We also note that it is not clear from the record that all the BOCs that offer CNSs would require the authorization from ESPs that SWBT proposes, raising the question of whether the authorization is absolutely necessary. For example, Pactel and Ameritech both offer CNSs without mentioning the need for such authorization. Indeed, Pactel apparently

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160 In a forthcoming notice of proposed rulemaking, we will propose modifications of our Part 69 access rules to permit the inclusion of interstate BSEs, on an unbundled basis, and interstate BSAs in our general access tariff structure. See infra paras. 278-280.

161 We recognize, of course, that CNSs, as features provided on ordinary subscriber lines, may be used with interstate services, both basic and enhanced. We have decided, however, not to require separate federal tariffing of such services at this time.

162 For example, an end user who grants such authorization may not be aware that a particular CNS will cause the types of technical incompatibility with other services, basic or enhanced, that SWBT identifies as the source of its concern.

163 Appendix B at 9. For example, even assuming that authorization could prevent the technical problems to which SWBT alludes, SWBT does not state why its relationship with its enhanced service affiliate eliminates the danger that its affiliate's customers could be improperly billed for CNSs that they did not order, or why the affiliate would not order a CNS for a customer that technically conflicts with the service of a competing ESP or with arrangements established by SWBT's local operations.

intends to permit ESPs to obtain certain CNS-type services on a bulk-purchase basis so that ESPs can incorporate these features in their offerings to the public. In addition, Bell Atlantic, BellSouth, NYNEX, and US West all offer BSEs, without a similar authorization requirement, that appear to be the equivalent of certain CNSs that SWBT proposes to offer.

88. We will not rule on this issue at this time. While this issue has been raised principally with respect to SWBT, in light of the somewhat ambiguous state of the record, we direct all the BOCs to amend their plans by May 19, 1989, to explain in fuller detail any proposed "authorization" requirements in connection with ESPs' purchase of CNSs to be provisioned on their customers' lines and to state whether their own affiliates will be exempted from such a requirement.[164] If any BOC intends to apply a different

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164 We have provided rules and procedures for IXCs to interact with LECs on behalf of their customers in changing customer presubscriptions to a primary IXC. We originally required IXCs to obtain letters of agency from their customers prior to submitting customer requests to the LECs for changes in their presubscribed IXCs. See Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, 101 FCC 2d 911 (1985)(Allocation Order); recon. denied, 102 FCC 2d 503 (Reconsideration Order); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, 101 FCC 2d 935 (1985)(Waiver Order).

On reconsideration, in response to representations by the IXCs that this letter of agency requirement disrupted "established industry practice" whereby carriers accept telephone orders from their customers, we permitted each IXC to submit customer orders upon the IXC's certification that "it had on file, or had taken steps to obtain, a letter of agency from the customer." See Reconsideration Order, 102 FCC 2d at 510-512. We advised IXCs to "maintain such signed customer authorizations on file for use in dispute resolution." Id. at 512.

Most recently, we have stated that we intended to facilitate the IXCs' marketing efforts while maintaining the protection embodied in their agency requirement, and that we did not intend that consumers be made financially liable, even temporarily, for changes which they did not authorize. We clarified that our orders could not be construed to permit a LEC to collect any charge from a customer for changing its presubscription if the customer denies requesting the change and neither the LEC nor the IC can produce sufficient evidence to show that the customer requested or authorized a change. Illinois Citizens Utility Board Petition for Rulemaking, Memorandum Opinion and Order, 2 FCC Rcd 1726 (1987).

While the issues examined in these orders are not strictly analogous to the problems SWBT describes, it may prove useful to the BOCs to consider these cases in defining their own treatment of "authorization" for ESPs who

standard to its own affiliate in this regard, it should explain in detail why such different treatment is necessary.[165]

3. Ancillary Services

a. Positions of the Parties

89. Certain commenters express concern that the BOCs have improperly classified some services that are critical to the ability of ESPs to participate in new enhanced service opportunities as "ancillary" or "other" services that do not fall within the scope of ONA. Although, as noted above, the BOCs propose a mix of basic and unregulated services in the ANS or "other" service category,[166] commenters focus on two particular services as being important to them: billing and collection and access to operation support systems (OSS).[167] For example, ESC claims that ancillary services such as billing and collection are universally treated by the BOCs as being beyond the scope of their ONA plans. ESC says that without being able to obtain such vital services pursuant to standard terms and conditions, most start-up ESPs will be forced to seek more costly and less effective alternatives.[168] According to ESC, access to OSSs also is another service vital to ESPs that the BOCs have placed outside the purview of ONA.[169]

90. To avoid improper labeling that could result in the placement of important services outside ONA regulatory protections, Telenet urges us to adopt an "essentiality test" to determine whether an offering should be a BSE or an ANS. Under this test, if a possible offering is an essential

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wish to purchase CNSs for their customers.

165 While we do not intend to limit the BOCs from offering "one-stop shopping" marketing opportunities to their customers, the BOCs bear a heavy burden to justify proposals, such as that described above, that would restrict their competitors from offering "one-stop shopping" in the same manner that the BOCs can. We will only approve such a proposed restriction if it is both narrowly focused and fully justified in a plan amendment.

166 See supra para. 57; see also Appendix B.

167 The term "OSS" includes BOC databases and automated or manual systems for storing or controlling installation, diagnostic, and maintenance information that many ESPs claim are needed to control their telecommunications services efficiently.

168 ESC Comments at 7.

169 Id. at 6-7; US Sprint Comments at 28-29.

component of an existing BSE or is essential for the highest quality operation or use of a BSE, then we should require it to be offered as a BSE rather than an ANS.[170] In regard to billing and collection, Telenet acknowledges that these services have been detariffed, and does not now request that such services be offered as BSEs. However, it requests that we take steps to minimize the possibility of discrimination in the provision of these services by the BOCs. Telenet shares ESC's concern that ANSs, as non-tariffed and unregulated services outside the scope of the ONA requirements, might not be offered to all parties, or might be offered to different parties at different prices.[171] To protect against this, Telenet advocates that we apply nondiscrimination safeguards to the provision of ancillary services so that a BOC cannot offer ANSs to only selected ESPs or offer them at different prices to different ESPs.[172] Otherwise, says Telenet, the BOCs would be giving unreasonable preferences in violation of both Title I and Title II of the Communications Act and of the MFJ.

91. ATSI agrees that the BOCs must provide billing and collection services to their own enhanced service operations and their competitors on equal terms. ATSI argues that while competing ESPs can theoretically provide their own billing and collection services, a BOC enhanced services operation can rely on the telephone company's established billing and collection process and thereby avoid substantial costs incurred by its competitors for these

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170 Telenet Comments at 18. According to this functional approach, Telenet says that access to OSS would be a BSE but that BOC provision of billing and collection services, for example, would not.

171 Id. at 16, 20-21. Telenet states that the potential for discrimination in BOC provision of billing and collection is not just a theoretical concern. For example, it says that BellSouth has indicated that it will contract with its own ESP for provision of billing services, and that it will offer to negotiate a contract with other ESPs -- not that it will offer the same terms to other ESPs to assure nondiscrimination. Telenet says that US West takes a similar position.

172 Telenet says that in situations where one "below the line" activity of the BOC takes an ancillary service from another "below the line" activity of the BOC, simple "nondiscrimination" may not provide ESPs with sufficient protection. Telenet argues that if other ESPs have no alternative source for the ancillary service, then the BOC may have incentives to engage in price gouging even if it charges itself the same high price. Accordingly, Telenet argues, we should direct the BOCs not to discriminate against competitors in the offering of ancillary services, either directly (through disparate pricing) or indirectly (through above-cost pricing). Telenet Comments at 19-21.

services.[173] This advantage, says ATSI, arises not from any efficiency on the part of the BOCs' enhanced services operation, but from its affiliate's monopoly telephone operations.[174] ATSI says that we must ensure that an appropriate portion of the costs of joint billing services, as determined under the Joint Cost rules, is allocated to the BOCs' voice messaging operations.[175]

92. US Sprint says that our control over potential discriminatory treatment logically extends to various ANSs offered by the BOCs. To reflect this, US Sprint claims that we should require the BOCs to attest that they will provide ANSs to all ESPs at rates and on terms equivalent to those governing provision of service to affiliated ESPs.[176] According to US Sprint, all services that are not detariffed or deregulated should be classified as BSEs rather than as ancillary services.[177] Indiana says that we should withhold approval of the ONA plans until the BOCs clarify how they will provide these services on a nondiscriminatory basis without harm to the provision of basic services.[178]

93. Tymnet maintains that it is clearly a competitive advantage for a BOC-affiliated ESP to have available less expensive billing, collection, or diagnostic services (i.e. OSS) than its competitors.[179] For this reason,

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173 ALC adds that BOC provided billing and collection is essential for ESPs to provide ubiquitous service to casual users. ALC says that only the BOCs, because of their privileged position as monopoly local exchange service providers, have the economies of scope necessary to profitably bill such users of ONA services. ALC Comments at 16 n.36.

174 Similarly, Dun & Bradstreet claims that if any service provided by a BOC is dependent upon or based upon the BOC's monopoly distribution service, access to that service ought to be on a nondiscriminatory basis, regardless of how the service is labeled. Dun & Bradstreet Comments at 30.

175 ATSI Comments at 21 n. 46.

176 US Sprint Comments at 26; See also US Sprint Reply at 14; Tymnet Comments at 52-56; Telenet Comments at 19-21.

177 US Sprint Comments at 26.

178 Indiana Reply at 13.

179 Tymnet Comments at 55-56. Tymnet acknowledges that not all BOCs avail themselves of this advantage. For example, Tymnet notes that SWBT pledges that all competing providers will take any available ancillary service at the same rate. However, Tymnet says that other BOCs do not provide similar assurances so that ONA protection is needed. See also ATSI Comments at 21.

Tymnet also contends that ancillary services should receive ONA protections.[180] ALC adds that ANSs must be made available on a nondiscriminatory basis in all areas where technically possible, regardless of where ONA has been implemented.[181] If this is not required, says ALC, a LEC could make decisions about the availability of ANSs based upon its desire to minimize penetration by ESP competition in certain areas, pending its own future decision to offer enhanced services in such areas.

94. A number of ESPs comment specifically on the need for access to OSS. Telenet says that it has requested that access to a BOCs' OSS be made available to it as a BSE but that none of the BOCs have accomodated its request.[182] Telenet notes that several BOCs indicate that OSS will be offered as an ANS and says that this classification of OSS as an ANS is incorrect because access to OSS is essential to its operations under ONA.[183] Telenet claims that while ESPs have currently limited indirect access to OSS information, direct access would permit it to independently monitor its network and improve the quality of its services to the public.

95. IDCMA agrees, saying that in a multicarrier, multivendor telecommunications environment, it is imperative that users have sufficient diagnostic capability to identify and isolate problems in their networks.[184] IDCMA claims that lack of the network management capabilities of OSS prevents ESPs from competing with the BOCs on an equivalent basis because they cannot perform the same trouble-shooting, diagnostic, and maintenance functions that the BOCs can. IDCMA says that users lack of diagnositic and maintenance capabilities strengthens the BOCs' power to engage in anticompetitive conduct.

96. US Sprint adds that while the BOCs have acknowledged the need for access to various forms of OSS, most have not committed to providing access to OSS by a firm date, or even in the foreseeable future.[185] US Sprint says that the lack of a firm commitment date for access to OSS is particularly troublesome because BOC enhanced services personnel, in contrast to other ESPs, may have access to their associated carrier's internal computer systems.

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180 Id.

181 ALC Comments at 17.

182 Telenet Comments at 17.

183 See Id. and Appendix "A" at 20-24.

184 IDCMA Comments at 19-20.

185 US Sprint Comments at 28.

In addition, US Sprint says that it is unclear whether some of the BOCs ever intend to provide access to various types of OSS on an unbundled basis, given that they maintain that OSS is outside the framework of ONA.

97. In reply, Ameritech defends its decision not to classify a variety of "ancillary" or "other" services as BSEs, claiming that parties who criticize its approach merely wish to force the repricing of existing exchange services for their own advantage under the guise of ONA.[186]

98. Bell Atlantic says that it is actively assessing customer requirements and evaluating service options that would allow customer access to various maintenance and diagnostics functions of its network.[187]

99. Pactel disagrees with commenters who claim that it is required under ONA to provide ANS such as billing and collection because they are "essential"[188] and "dependent upon or based upon the BOC's monopoly distribution service"[189] or "useful".[190] Pactel maintains that its ANSs are not "network" services and are not basic services that the BOCs must provide on an equal access basis to all enhanced service providers.[191] Pactel states that it does not believe that the price, terms, and conditions of ancillary services that it offers it own affiliate must be equal to that offered competing enhanced service providers.[192]

100. Pactel says that the ESPs want access to the ANSs of the BOCs not because they are essential as bottleneck offerings, but because they believe that they can leverage off the BOCs' economies of scale and scope. Pactel specifically contends that ESPs do not want the BOCs to do their billing and collection because it is "necessary", but because they believe that the BOCs can do it cheaper than they can do their own billing. Pactel says this is not the purpose of ONA.[193]

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186 Ameritech Reply at 20-21.

187 Bell Atlantic Reply Comments Appendix "Bell Atlantic Positions on ANPA Functionalities" at 9.

188 See Telenet Comments at 18, 20.

189 See Dun and Bradstreet Comments at 30.

190 See IBM Comments at 11.

191 Pactel Reply at 17.

192 Id.

193 Id. at 20.

101. Pactel opposes commenters' argument that non-tariffed offerings must be offered on the same terms and conditions to all comers, in order to prevent the BOCs' enhanced services from gaining "a competitive advantage." Pactel says that ancillary services are in fact "enhanced" and/or competitive by our definition and, therefore, we should not require them to be offered in any particular manner. For example, Pactel says that we detariffed billing and collection because we determined that these services are competitive. Pactel claims that Telenet would reverse this holding, or at least ask the Commission to establish rates, terms, and conditions for these services.[194] Pactel adds that we spent years developing the principles of joint cost accounting, under which enhanced services offered by Pactel will incur fully distributed costs for billing and collection.[195] These rules, it says, are adequate to meet the concerns of the commenting parties.

102. Pactel does not state in its ONA plan that it will offer billing and collection services to ESPs. However, in Pactel's reply comments on its CEI plan for Electronic Messaging Services (EMS), Pactel discusses the possibility of providing the "underlying information" that enhanced service providers need to prepare their own bills.[196] For example, Pactel states that "the Commission's orders do not require the BOCs to provide billing services -- bill preparation, mailing, collection, and remittance -- as a BSE" on the basis that such services are not "network" capabilities. Pactel contrasts these so-called non-network capabilities with "the ability to identify the calling number, billing address, duration of a call, etc. [that] are the basic network capabilities which the BOCs may be required to provide."[197] However, Pactel does not commit to providing such information, as a basic service or in any other fashion, in either the EMS proceeding or in ONA. Pactel says that once an ESP has the information generated by its basic network functions, it has a wide variety of choices as to who will perform such other functions as tabulating, formatting, printing, mailing, and collection. Pactel says that it is evaluating the possibility of providing these services to ESPs as well.

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194 Id. at 19, citing In the Matter of Billing and Collection Services (Detariffing Order), Report and Order, 102 FCC 2d 1150 (1986).

195 Id. Pactel adds that under our joint cost accounting rules, enhanced services offered by Pactel will incur fully distributed costs for billing and collection.

196 See Pacific Bell and Nevada Bell Plan for the Provision of Electronic Messaging Service, Pactel Reply at 4-5 (filed Aug. 19, 1988).

197 Id.

103. US West states that the contract offering of ancillary services such as billing does not violate ONA rules that ensure nondiscrimination between BOCs and ESPs. Ancillary services, it says, are services that telephone companies provide that do not involve the transmission of messages on a common carrier basis. As such, says US West, these services are not appropriately treated as BSEs.[198]

104. US West specifically asserts that we have deregulated billing services because they are not communications common carriage within Title II, and because they are sufficiently "competitive" to forestall any excessive rates or unreasonable practices in this area. US West says that one of the main reasons we detariffed billing was to increase competition by affording "flexibility" to the LECs. Such flexibility, it says, would be considerably more difficult to achieve under a regulatory requirement of equal terms and conditions for such detariffed services.[199]

b. Discussion

105. Although the BOCs identify "ancillary" or "other" services as a distinct category of network services, the category's boundaries appear amorphous and subject to wide interpretation. Some BOCs, like SWBT, state that ancillary services may include all detariffed and unregulated offerings, while others merely state that ancillary services are "outside the ONA framework". Thus, in the various plans, this category includes a mix of basic services, such as derived local channels, digital private lines, and inband signaling, and unregulated services, such as protocol processing. We note that the conditions under which the BOCs state that they will offer these services also varies. Some, like Ameritech, say that they will offer such services on a nondiscriminatory basis, while others expressly reserve the right to provide themselves unregulated ancillary services on terms and conditions that may differ from those offered to others.

106. We do not object to the BOCs' use of the ANS or "other service" category for unregulated services, since it may be useful for ONA purposes to distinguish between such services and the basic, regulated, common carrier services the BOCs provide to ESPs and others. However, we do not see any value in including the latter type of services in the ancillary category. The other three categories of the common ONA model appear to capture all the differentiation of basic services that is relevant in an ONA context. These three categories have some analytic content and meaningful "eligibility" criteria. ANSs as applied to regulated service have neither. Thus, to

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198 US West Reply at 77-80.

199 Id. at 80.

minimize confusion about the definition or significance of this category, we require that all regulated services now classified in the "ancillary" or "other service" category be reclassified as either BSEs, BSAs, or CNSs. Accordingly, each BOC must amend its plan by May 19, 1989, so that only those services that are presently unregulated remain in this category.

107. We do not attach further requirements to this service category at this time. Only unregulated services will remain in this category after the plan amendments. We believe that sufficient competition for such services exists to allow market forces to respond to discriminatory practices by providers of these services. However, should problems arise, we will reconsider our regulatory treatment of this category pursuant to our ancillary jurisdiction under Title I of the Act.[200] By allowing ANSs to be offered without unnecessary regulation during the initial implementation of ONA, we seek to enhance competition while at the same time giving providers flexibility in structuring and pricing their offerings.

108. A number of parties request that billing services be offered under the ONA requirements. Of course, the billing and collection service performed by the BOCs for IXCs has been deregulated. Specifically, in the Detariffing Order,[201] pursuant to our Title I jurisdiction over activities incidental to communications, we determined that sufficient competition existed in the provision of these services, at least as pertains to the LEC provision of these services for interexchange carriers, to end our regulation of them on January 1, 1987.[202] We required the LECs to continue to offer the recording function[203] to IXCs under reasonable terms and upon reasonable request through 1989 or until equal access conversion has been completed, whichever is later.[204]

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200 Our complaint process is also available to address such problems on an individualized, fact-specific basis.

201 102 FCC 2d 1150 (1986).

202 Id.

203 "Recording," as opposed to billing, means the recordation of data sufficient to perform billing services such as time and date of calls, call duration, and the originating and terminating numbers. Detariffing Order, 102 FCC 2d at 1173-1174, paras. 45-46.

204 We also preempted the states from regulating billing and collection services for interstate carriers. We stated that state regulation of billing and collection services is not required to protect interstate carriers and their customers from excessive billing and collection charges and might lead to excessive charges that would tend to frustrate the goals of the Act. However, we deferred to state regulatory authority to determine whether or

109. Although our Title I authority over the BOCs' billing and collection activities is clear, since such activities are incidental to communications, we decline at this time to mandate that the BOCs offer these pursuant to the ONA requirements. The parties recognize that we have largely deregulated these competitive services, and we see no need to reregulate them. However, we do require that the BOCs clarify their plans in regard to these services by describing any service that they will offer that would provide ESPs with information that is useful for bill preparation such as the calling number, billing address, or duration of a call. As we have noted, Pactel states in a CEI context that it could provide "underlying information", which enhanced service providers need to prepare their own bills, as a basic service.[205] This is a promising development that may address at least some of the commenters' concerns.[206] We require Pactel to explain in detail by May 19, 1989, its plans, if any, to offer such information, and we request the IILC to consider means of providing such information.[207]

110. Parties also request that the BOCs offer access to OSSs. As with billing and collection, we do not require that the BOCs provide this service under ONA at this time, but we direct the BOCs to amend their plans by May 19, 1989, to specify the OSSs they are capable of offering to ESPs in the near term, and to discuss their ability to offer such services in the future.[208] Recognizing that technical, security, and network control issues

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not LECs should be permitted to offer disconnection of local service as part of their billing and collection services for interstate carriers. Detariffing Order, 102 FCC 2d at 1176-1177, para. 51-52.

205 See supra at para. 102. Such information apparently would be similar to that provided through such Centrex functions as Station Message Detail Recording and Forwarded Call Information, which we found to be basic services in the NATA/Centrex Reconsideration, 3 FCC Rcd at 4390, para. 35.

206 We note that Ameritech is offering information that may be useful to ESPs in preparing their bills as a BSE. See Ameritech Plan at 55 (Call Detail Recording).

207 In addition, we require all other BOCs to clarify by May 19, 1989, their plans, if any, to offer this information. We will examine such clarifications with care to determine the conditions under which the BOCs should offer such services.

208 Currently, the term "OSS" appears to cover a wide range of both regulated and unregulated services. In developing these services, the BOCs should consider whether their OSS offerings are basic services or whether they are unregulated ancillary services. For example, "Diagnostic Channel on DSO and Subrate Lines", which appears to provide some access to OSS

associated with OSS may need to be resolved before customers can access the BOCs' internal systems, we also direct the BOCs to address, through the IILC, the most feasible method for the BOCs to provide access to OSSs for ESPs in a manner that is both consistent with these concerns and responsive to ESP needs.

V. INITIAL ONA OFFERINGS

A. Background

1. ONA Requirements

111. The Phase I Order described the requirements for the ONA plans. We required the BOCs to develop an initial set of BSEs derived from the industry input process and offer these within one year of our approval of a given ONA plan.[209] We required carriers to specify these initial BSEs in ONA plans and to describe their procedures for the offering of new BSEs.[210]

2. Selection Criteria

112. While obtaining industry input, each BOC began the process of analyzing the information obtained from the ESPs and of developing its initial ONA offering for inclusion in its plan. Such inclusion was in accordance with the selection criteria of the Phase I Order: expected market demand for such elements, their utility as perceived by enhanced service competitors, and the technical and costing feasibility of such unbundling.[211] The BOC plans describe in detail the procedures used in evaluating requests for ONA services pursuant to these criteria. We summarize such procedures in detail in Appendix C. The BOCs describe elaborate market research programs, the liberal use of well-known consultants, the use of sophisticated utility analysis and demand modeling and utility programs, and the subsequent iterative application of multiple feasibility criteria; but none offer quantitative demand or cost data. For example, some plans describe in detail their market research

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information, is offered by Bell Atlantic, NYNEX, Pactel and SWBT as a basic service. Other diagnostically useful services, such as "Service Control Point Databases," appear to be offered by the BOCs as unregulated services.

209 Phase I Order, 104 FCC 2d at 1065, para. 216.

210 Id. at 1066, 1067, paras. 217, 220.

211 Id. at 1065, para. 217.

methodology (e.g., the use of questionaires and consultants), but do not offer either qualitative or quantitative demand data of any kind.[212] The plans do not provide detailed or specific cost feasibility data.[213] However, the plans discuss the technical feasibility of requested NCs in greater detail.

B. Initial Offerings

113. Each plan lists an initial set of proposed ONA services that is based on each BOC's application of the ONA selection criteria. Each BOC applied these criteria to evaluate the 118 NC requests listed in Report No. 1, as well as to additional requests, which varied among the regions.[214] In addressing the 118 NC requests listed in Report No. 1 for the purposes of developing the initial offerings in their ONA Plans, all of the BOCs' plans use the common ONA model in its most general formulation: i.e., (a) each model is based upon the existing, embedded network architecture,[215] and (b)

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212 For example, BellSouth evaluates and offers its evaluation of market demand on a 1-5 scale. US West does not make its data public, but offers to provide such data to us on a confidential basis. See Appendix C, paras. 8, 22.

213 For example, BellSouth assesses cost feasibility on a "Yes"-"No" basis but does not offer any underlying data. SWBT states that the "cost overview and results provided in [SWBT's] Appendix 15B are from previously completed cost studies that were used as surrogates for certain BSAs/BSEs. New cost studies specifically for the BSAs/BSEs filed in this proceeding have not been developed due to time constraints." SWB Plan at Appendix 15B. SWBT did not identify any relevant cost studies for NCs that it did not choose to offer.

214 These additional requests were derived from the original list of 157 as compiled by the Ad Hoc Committee and from inputs derived from specific regional market research activities. See, e.g., Ameritech Plan at 22; Bell Atlantic Plan at 17-20; BellSouth Plan at Attachment L. Our statistical and qualitative analyses of the treatment of NC requests by the seven BOCs, as described herein, are focused, however, on the set of 118 in Report No. 1. These have been uniformly named, defined, and addressed by each of the seven regions. As a consequence, we can gain a more meaningful insight into the aggregate, as well as individual, performance of the BOCs in providing ONA on a national basis. Furthermore, these 118 NCs are the principal focus of commenters. Finally, we have also reviewed the BOCs' treatment of the additional requests, and this review indicates that the observations and conclusions we draw hereinafter are not significantly affected by the omission of these from our formal analysis.

215 The existing architecture consists of: (a) local subscriber loops, (b) an end office with a stored program controlled switch, and (c) interoffice

existing tariffed services will be used to access unbundled functionalities residing in the end office.[216] On the other hand, the BOCs have not uniformly matched the 118 NCs identified in Report No. 1 with the Report No. 4 categories, i.e., BSA, BSE, CNS, ANS. For example:

(a) the categorizations of specific NCs may vary among the BOCs;[217]

(b) even though the list of 118 NCs was intended to exclude ancillary services some BOCs include NCs in that category;[218]

(c) Bell Atlantic, BellSouth, NYNEX, and US West do not use the CNS category;

(d) Bell Atlantic and US West do not use the BSA category.[219]

114. Statistical analyses of the initially proposed ONA services are tabulated in Appendices D and E, infra. The initial ONA offerings of each BOC generally follow the nomenclature and numbering system for the NCs appearing in Report No. 2.[220] ONA services do, however, vary considerably

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transport network.

216 In some plans, these are re-labelled as BSAs or CNSs; in others, they are offered as existing tariffed services.

217 For example, NC # 74 (Detect Breaks in Telco Line Within 60 Seconds) has been classified in all possible categories: BSA (NYNEX); BSE (Bell Atlantic and US West); BSE or CNS (Ameritech); ANS (SWBT). In addition, BellSouth simply calls it a currently tariffed service. Pactel has not indicated a classification since it does not plan to offer this service due to asserted technological limitations in its network.

218 NYNEX and SWBT have chosen to offer the following as ancillary services: NYNEX--#89 (Monthly Detailed Recording); and SWBT--#74 (Detect Breaks in Telco Line Within 60 Seconds). In addition, Ameritech includes a number of the 118 NCs in its "other" services category, which appears to be comparable to the "ancillary" category in other BOC plans.

219 These BOCs identify NCs that others categorize as BSAs as currently available tariffed services.

220 The specific offerings of each BOC have been tabulated in the Hatfield Comments, Appendix 4-12. See also Ameritech Plan at 39-62; Bell Atlantic Plan at 7-28; BellSouth Plan at Attachment B; NYNEX Plan at 19-27; Pactel Plan at Appendix B; SWBT Plan at 42-75; US West Plan at Appendix D.

from BOC to BOC. For example, while the number of ONA services that each BOC proposes for the initial offering is reasonably consistent (ranging from 58 for Bell Atlantic to 49 for SWBT)[221] only 29 of the NCs would be offered in all seven regions.

C. Positions of Parties

115. The overwhelming majority of ESPs and users argue, mostly in general terms, that the BOCs' initially proposed ONA services do not constitute a sufficiently high proportion of the 118 NCs listed in Report No. 1, and do not meet ESPs' needs. The BOCs reply, also in general terms, that their initial ONA offerings are an appropriate product of the application of our selection criteria, and that the BOCs have balanced the ESPs' requests against market demand and costing feasibility pursuant to the guidelines in the Phase I Order. In framing these objections, however, few of the parties specifically challenge the methodology employed by the BOCs in applying our selection criteria to selection of NCs. ADT claims that the BOCs do not give adequate reasons for rejecting NCs, but cites no specific examples.[222] AICC and ANPA find fault with the process of determining and reporting market demand.[223] California cautions that the evaluation process must recognize the existence of locally imposed criteria for risk assessment.[224]

116. The BOCs counter commenters' criticisms of the initial offerings with the following responses, among others: (a) the ESPs have provided inconclusive demand data and have inadequately participated in the market research process;[225] (b) some NCs that parties claim to be omitted from the initial offerings already exist as tariffed services;[226] (c) several

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221 Thus, each BOC is proposing to implement approximately 45% of the total of 118 NC requests.

222 See ADT comments at 5-6.

223 See AICC-Ameritech Comments at 21-23 ; AICC-BellSouth Comments at 20; AICC-NYNEX Comments at 19-21 ; AICC-Pactel Comments at 15-17; ANPA Comments at 9.

224 California Comments at 7.

225 See, e.g., Ameritech Reply at 34-36, 42; Bell Atlantic Reply at 18, and Pactel Reply at 21-22.

226 See, e.g., Bell Atlantic Reply at 24-25; BellSouth Reply at 21-22.

requested NCs that have been omitted from the initial ONA offerings are technologically infeasible, or depend upon the implementation of future technologies such as ISDN.[227]

117. Some parties do, however, offer specific examples to support their position that the initial ONA offerings do not respond to their needs. For example, Telenet and Tymnet submit a list of five priority requests that, they claim, the BOCs have not adequately addressed: (a) Calling Number Identification (which, they claim, is provided only by SWBT); (b) Uniform Access Numbers (provided only by Bell Atlantic); (c) Derived Data Channel Access (provided only by NYNEX); (d) D-Channel Data Delivery on B Channel (only Ameritech, Pactel, and SWBT have agreed to support standards development); (e) improved installation, maintenance, and diagnostic capability (not proposed by any of the BOCs).[228]

118. The Bell Atlantic reply states that (a) it is offering two of these features (Calling Number Identification and Uniform Access Numbers) as initial BSEs; (b) it will provide Derived Channel Access on customer request; (c) D Channel Delivery on B Channel will be provided when ISDN is implemented; and (d) it will attempt, during 1989, to explore the Telenet/Tymnet request to obtain access to operations support systems by conducting field trials.[229] Similarly, BellSouth replies that: (a) it can offer the first three features as BSEs; (b) D Channel Delivery is technically infeasible; and (c) access to diagnostics is not a BSE, but an ancillary service.[230]

119. Several companies in the alarm industry also discuss specific capabilities that, they claim, the BOCs have not appropriately addressed. ADT lists five such requests: (a) NC #20, Derived Local Channels (lack of commitment by the BOCs to develop this technology); (b) NC #68, Derived Local Channels that Comply with UL and NFPA Standards (no commitment to supply backup power for derived local channel equipment at the end office); (c) NC

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227 See, e.g., BellSouth Reply at 20; NYNEX Reply at 59-61.

228 See Telenet Comments at 24-25, and Appendix A at 24-24A. See also Tymnet Comments at 63-66.

229 See Bell Atlantic Reply at 24-25.

230 See BellSouth Reply at 21-22. Only Bell Atlantic and BellSouth addressed the claims of Telenet and Tymnet.

#70, Derived Channels Compatible with ISDN (no response to a request to make these compatible with ISDN); (d) NC #85-86, User Initiated Diagnostics and Pass Through Diagnostics to User (not being offered); (e) InterLATA Alarm Signal Transmission (no indication of how this would be handled).[231]

120. AICC states Bell Atlantic has not unbundled those BSEs that the alarm industry would find useful, claiming that: (a) Bell Atlantic has substituted REACT for the Derived Local Channels NC, but REACT is an inadequate, existing local service; and (b) Bell Atlantic has also substituted existing services for (i) the Detect Breaks in Telephone Lines in 60 sec. and Remote Alarm Signals.[232] API/Wells Fargo, filing as an alarm service provider, claims that it had requested that Pactel unbundle its derived channel, Poll Star, but Pactel has not responded to this request.[233] None of the BOC replies addresses the specific claims of ADT, AICC, and API/Wells Fargo.[234]

121. NCR claims that the BOCs have rebuffed almost all of its ten ONA service requests for diagnostic testing and network configuration tools on the ground that the necessary technology will not be in place by the end of 1989.[235] IDCMA also asks for customer controlled network management capabilities. It says the BOCs have discussed such capabilities in general terms for future deployment but have not included thes capabilities in the initial ONA service sets.[236]

122. Finally, ANPA cites a study, which it commissioned, that surveys the ONA requirements for the electronic publishing industry. ANPA claims that three quarters of the capabilities identified in its study are not addressed in the ONA plans.[237] However, the ANPA study notes, "This report is not intended to specify the ONA elements required, but to alert the

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231 See ADT Comments at 31-40.

232 See AICC Comments at 15 (Bell Atlantic).

233 See API/Wells Fargo Comments at 9-11.

234 However, NYNEX notes that it offers BSAs for data-over-voice and for "alarm services transport". See NYNEX Reply at 62.

235 NCR Comments at 19.

236 IDCMA Comments at 19.

237 ANPA Comments at 9-11.

telephone industry to electronic publishing needs that will have an impact on their ONA offerings."[238]

123. In addition to textual comments, some parties present tabular, item-by-item analyses of the deployment and the utility of the BOCs' proposed initial offerings. AT&T and Hatfield analyze the BOCs' treatment of each of the the 118 NCs listed in Report No. 1.[239] AT&T's study summarizes the treatment of each of the 118 NCs by each BOC as follows: (a) if offered, the manner in which it is categorized (existing tariffed service, BSA, BSE, CNS, ANS, etc.); (b) if not offered, the reason why (technically infeasible, not in current plans, not a basic service, etc.). The Hatfield analysis follows a similar format.

124. Bell Atlantic analyzes the list of 118 NCs in terms of their potential utility to the various sectors of the ESP community.[240] Its study, also in matrix form, indicates the usefulness of the NCs on an industry-wide basis by matching each NC to each of the five following ESP sectors: Telephone Answering; Alarm Systems; VANs; Data Base Providers; and Transaction Services. Bell Atlantic states that it bases its judgments of usefulness on industry inputs obtained during its ONA market research effort.

D. Discussion

125. ESPs contend that the BOCs' initial sets of ONA services do not meet ESPs' needs generally and do not adequately respond to their requests for specific NCs. Commenters also criticize an apparent lack of uniformity among the initial ONA services. Although the BOCs' initial sets are somewhat limited, we believe that, taken as a whole, the initial ONA services are a useful first step in implementing ONA. In light of the amendments to the BOC plans that we require in this order, and because the BOCs have proposed types of initial ONA services that we contemplated in Computer III, we approve the BOCs' initial ONA service proposals.[241] The proposed services, which are based upon existing embedded technology, are acceptable, given the technical limitations of the network and the initially uncertain market demand for such

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238 ANPA Comments, App. 1 at 3.

239 AT&T Comments, Appendix A, Hatfield Comments, Appendix.

240 Ex parte presentation to Commission staff, June 9, 1988, National ONA Request List Sorted by Enhanced Service Industry. See also Table 3 (Number of Useful NCs), in Appendix D, infra.

241 As noted above, however, for federal tariffing purposes, "interstate" BSEs may include services that the BOC plans classify as BSEs, CNSs, and ANSs in their plans. See supra para. 86.

services. Although only 29 of the 118 NC requests will be provided in all seven regions, the initial BOC offerings will permit ESPs to obtain useful network functions and capabilities that are an improvement upon the status quo. We thus permit the BOCs to begin implementing their initial sets of ONA services.

126. However, there is merit to commenters' concerns regarding the long-term need for the implementation of more requested NCs, and the lack of uniformity among the initial offerings. We require the BOCs to implement their initial services consistently with the guidelines for uniformity, deployment, and network evolution. In addition, we require the BOCs to describe more fully their reasons, other than technical infeasibility, for not offering other NCs.[242]

127. Although Telenet, Tymnet, and other ESPs describe lists of NCs that they requested but that the BOCs allegedly did not provide, these claims are insufficient grounds for us to reject the initial lists of ONA services proposed in the plans. An examination of the initial sets of ONA services indicates that some of the BOCs propose to offer at least some of the requested capabilities.[243] Moreover, many, if not most, of the capabilities that these parties request are currently unavailable for technical reasons.[244] Based on the BOCs' description of these technical reasons, it appears that the requested NCs could not be made available immediately. In Section VII below, we direct the BOCs to take certain actions designed to increase uniformity in the ONA services they offer, and in Section X.B.4 we require the BOCs to describe more fully how new network developments will support ONA services. The BOCs' efforts in these areas must include consideration of the NC requests made by ESPs that the BOC plans have not included in their initial sets of ONA services, since an ESP request for service is a prima facie indication that such service would be useful in ESPs' businesses. We believe that such an approach is more practical than, for example, requiring the BOCs to include in their initial ONA offerings services that could only be deployed now at great expense, and with disruption to network evolution. Furthermore, because the proposed initial sets of ONA services are themselves useful to ESPs, we do not restrict the BOCs from providing the services listed in their initial sets of offerings.

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242 As noted in Section I, we will not remove the structural separation requirement for the BOCs' enhanced service operations until we approve the BOCs' amendments to their ONA plans and the BOCs implement their plans.

243 See, e.g., Bell Atlantic Reply at 24-25, BellSouth Reply at 21-22.

244 See infra para 132.

1. Initial ONA Offerings

128. We begin by analyzing the initial sets of ONA services by comparing each BOC offering with those of the other BOCs, as well as with the universe of the ONA services requested by the ESPs as characterized by the tabulation of 118 NCs in Report No. 1. Table 2 of Appendix D[245] analyzes the deployment of the initial NCs on a regional basis.[246] Table 2 shows that, as noted above, of the 118 NC requests, only 29 (24% of the total) would be deployed in all seven regions. Moreover, 37 NCs (31% of the total) are not scheduled for immediate deployment in any region. However, although only 29 services would be initially available in all 7 regions, the number of ONA services proposed for initial deployment within each region is considerably greater, ranging from 49 (SWBT) to 58 (Bell Atlantic).[247] On the average, the individual BOCs propose to offer approximately half of the initially requested NCs.

129. In addition to the absolute number of BSEs proposed as initial offerings, we also are interested in whether the proposed initial nationwide deployment may affect differently the various sectors of the ESP industry that would be using these services. The BOCs' initial offerings should not favor one type of ESP in the provision of useful services at the expense of another ESP. Table 3 (Number of Useful NCs) of Appendix D,[248] indicates that

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245 Table 2 is derived from Tables 1-8 in Appendix E (Analysis of Initial Offerings of BOCs), which in turn are derived from AT&T Comments, Revised Appendix A.

246 It should be noted that even though a particular NC may be deployed in a given region, it will generally not be ubiquitously deployed among all end offices within that region. While initial deployments are generally focused on major urban areas, a number of BOCs have included mid-sized or even rural areas in their initial offerings. See, e.g., Ameritech Plan at 65.

247 See infra Appendix D, Table 1 (# of NCs Initially Deployed by Each BOC). In its reply, Bell Atlantic lists 18 additional NCs that it also intends to offer initially. As a consequence, Bell Atlantic would be offering 64% of the requested NCs. See Bell Atlantic Reply, Appendix A. at 1.

248 The data in Table 3 are derived from an ex parte filing by Bell Atlantic. See letter from Donald E. Lavin, Bell Atlantic, to H. Walker Feaster, III (filed June 30, 1988). In that filing, Bell Atlantic correlated the 118 NC requests with those sectors of the ESP industry that requested them. The sectors analyzed in Table 3 are: Telephone Answering Services; Alarm Monitoring; VANs; Data Base Services; and Transaction Services. A "useful" service is defined as one that was requested by a given ESP sector.

of the set of 29 NCs that would be offered nationwide, the number of useful services ranges from 20 (for the Transaction Service sector) to 13 (for the Alarm Industry). This relatively even distribution tends to demonstrate that BOCs are proposing to offer services that will address some needs of most ESPs on a nationwide basis.

2. Application of Selection Criteria

130. We have also examined the manner in which the BOCs used the selection criteria established in the Phase I Order to determine whether to reject specific NC requests. Tables 2-8 of Appendix E indicate that, in most cases, the BOCs generally decided not to offer such NCs for reasons of near-term technological infeasiblity, rather than for reasons associated with market demand, costing, or other policy considerations.[249]

131. In deciding whether to deploy each of 118 requested NCs, the 7 BOCs collectively made 826 separate "yes-no" decisions. Our analysis indicates that 379 (46%) of these were positive decisions for immediate deployment, while 447 (54%) were decisions not to deploy initially. A further analysis of these negative decisions indicates that 387 (87%) of the negative decisions, were based upon technological considerations, while 46 decisions (10%) were based upon general policy or pricing grounds, and 14 (3%) were based upon other reasons (such as lack of data).

132. Analysis of Table 8 of Appendix E reveals that near-term technological infeasibility is the preponderant reason for not offering 37 NCs in any region.[250] BOCs claim that: (a) at least 22 of these NCs are not technologically feasible in the near term because the NCs depend upon technologies that are not yet deployed, such as ISDN, IN2, CCS#7, and OSS; (b) most of the remainder are technologically infeasible for other reasons;[251]

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249 Tables 2-8 identify: (a) the specific NCs that would be provided in 6, 5, 4, 3, 2, 1, or zero region(s); (b) those BOCs proposing to provide an NC, and the manner in which BOCs classify that NC (e.g., BSA, BSE, CNS, or ANS); and (c) those BOCs proposing not to provide a specific NC, and their reasons for so doing (i.e., technically infeasible; policy, pricing, or regulatory constraint; insufficient information; or other unspecified reason). Source: AT&T Comments, Appendix A and Commission staff analysis.

250 Analysis of Table 8, Appendix E, shows that of the total of 259 negative decisions made by the seven BOCs in rejecting 37 NCs for their initial offerings, 234 decisions were for reasons of near-term technological infeasibility. Nine rejections were based upon lack of sufficient information or for unspecified reasons. Sixteen rejections were based upon reasons related to policy, pricing, or regulatory constraints.

251 These features could be technologically infeasible because of

(c) not one of the 37 NCs has been unaniminously rejected for non-technical reasons, such as corporate policy. If we subtract these 37 NCs from the list of 118 NC, a total of 81 NC requests are technologically feasible in the short term. From this perspective, the initial ONA offerings of the BOCs include from 60% to 72% of those NCs that are technologically feasible.

133. BOCs rejected some ESP requests on grounds other than technical infeasibility. The Phase I Order established screening criteria including expected market demand and technical and costing feasibility. The Phase I Reconsideration clarified that "each ONA plan must describe all of the 'key' BSEs requested by enhanced service competitors, and the carrier's reasons for providing them or declining to provide them, based on our criteria."[252] We find that, at this time, the BOCs have made a convincing presentation of the manner in which they have applied the technical feasibility criterion.[253] The network capabilities that BOCs identify as being necessary for the implementation of certain requested ONA services have not yet been generally deployed in BOC networks.[254] Furthermore, the ESPs and other commenters have not effectively challenged the BOCs' representations concerning technical feasibility as a reason for non-inclusion of certain BSEs in the initial set.

134. However, when technical feasibility is not the predominant factor for rejecting requests for NCs, the BOCs do not generally state detailed reasons that are sufficient to allow us to determine whether such rejections are indeed valid. Specifically, BOCs have not sufficiently justified the application of the market demand and cost feasibility criteria to the NC request screening process. We direct the BOCs to amend their plans by May 19, 1989, to include a more comprehensive explication of the manner in which these criteria were applied. We are not requiring detailed reporting

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incompatibilities with existing transmission media, or because of the unavailability of required generics for stored program switches.

252 2 FCC Rcd at 3056, para. 150.

253 This finding is based upon (a) the nature of the efforts performed by the TAG, composed of representatives of the seven BOCs, that led to the issuance of BOC Special Report No. 2, Enhanced Service Provider Request for Network Capabilities, and BOC Special Report No. 3, Technical Analysis Report, and (b) the subsequent analyses by each of the individual BOCs as documented in their plans.

254 As discussed infra in Sections X.B-X.C, however, we find that the BOCs have not adequately explained how and when these new network capabilities will be used to provide additional ONA services or how ESP input will be incorporated into the ONA planning process for these new network technologies.

of quantitative source data from the business planning process -- that is, market studies, cost analysis results, and analyses of revenue, profitability, and cash flow. We do, however, require sufficient quantitative data and narrative to demonstrate the role of the non-technical criteria in the BOCs' decision processes.

135. The ESPs themselves have been reticent in providing the BOCs with market data, such as demand projections, which the ESPs may regard as highly proprietary. To resolve this dilemma, we urge the BOCs and ESPs to work together, through the IILC or a similar process, to attempt to develop procedures and formats the ESPs may use in requesting ONA services from the BOCs, including the use of contracts, or other procedures whereby proprietary market information can be exchanged, while maintaining its confidential status. We direct the BOCs to report the results of these efforts to us when the BOCs submit plan amendments by May 19, 1989.

VI. COMPLIANCE WITH CEI REQUIREMENTS

A. CEI Requirements

136. The Phase I Order established nine CEI parameters that define the ways in which a BOC must ensure that the basic services used by its enhanced service operations are available to other enhanced service providers in an equally efficient manner.[255] We did not require absolute technical equality, but rather sought to provide fairness and efficiency for all competing enhanced service providers. Factors that we use in evaluating whether this standard has been met include the absence of systematic differences between the basic service access given to the carrier and to others, end-user perception of quality, and utility to other ESPs.[256] Each BOC's ONA plan describes that BOC's plans to satisfy the CEI parameters. Parties do not question BOC compliance with four CEI parameters: Resale, End User Access, CEI Availability, and CEI Recipients. Based on our examination of the plans, we approve the BOCs' treatment of these four parameters. Two CEI parameters -- Unbundling and Installation, Maintenance, and Repair -- are discussed at Sections IV B and XI B, respectively. We discuss the remaining three parameters -- Interface Functionality, Technical Characteristics, and Minimization of Transmission Costs -- in this section.

B. CEI Parameters

1. Interface Functionality

137. The Phase I Order required carriers to provide ESPs with standardized hardware and software interfaces that support transmission, switching, and signaling functions identical to those utilized in the carrier's own enhanced service offerings.[257]

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255 The nine CEI paramaters are: Interface Functionality, Unbundling, Resale, Technical Characteristics, Installation, Maintenance, and Repair, End User Access, CEI Availability, Minimization of Transmission Costs, and CEI Recipients. Phase I Order, 104 FCC 2d at 1039-1043, paras. 154-167.

256 Phase I Reconsideration, 2 FCC Rcd at 3048, para. 92.

257 Phase I Order, 104 FCC 2d at 1039, para. 157. We also required that information and technical specifications for such interfaces be provided pursuant to our network information disclosure requirements.

a. The BOC Plans

138. According to Ameritech, it will provide BSA interconnection through standardized transmission interfaces and access link alternatives, and it provides a list of technical reference documents that contain technical specifications for its BSAs.[258] BellSouth states that its initial BSEs will be provided via standardized hardware and software interfaces that are generally available in the existing network, and lists three standards documents that define interfaces. However, it states that precise interface functionality will depend on the types of services requested, and that it will not attempt to address the numerous variations of technical specifications.[259]

139. Bell Atlantic states that its ONA services will use standardized hardware and software interfaces whose technical specifications are currently available. It says that it will make information and technical specifications regarding any new interfaces available according to our network disclosure requirements.[260] Similarly, NYNEX plans to use existing standardized interfaces for twelve of its fourteen BSAs, and notes that it has already disclosed information about those interfaces. It states that interface specifications for two of its BSAs have not yet been developed, but that it will disclose their technical characteristics according to the network disclosure rules.[261]

140. SWBT says it will provide technical characteristics at the interface that are equal from the end user's perspective. It claims that although there may be technically measurable differences in specific interface performance characteristics, any such differences will always be small and

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258 Ameritech Plan at 73, Appendix 10.

259 BellSouth Plan at 44-45. BellSouth lists three general standards documents that it states define the standard interfaces for its BSEs.

260 Bell Atlantic Plan at 64. For integrated basic and enhanced service offerings, such as packet switched data transmission with protocol conversion, Bell Atlantic states that it may be unable to provide identical interfaces, but will offer a "comparable" interface that supports basic network functions identical to those used by its enhanced service operations.

261 NYNEX Plan at 70-71. NYNEX states that it would not provide its enhanced service operations with unique interfaces because it would be a poor business decision to do so. It says that a unique interface would introduce maintenance, operational, and generic upgrade problems that would increase its costs and negate the advantages of such an interface. NYNEX Reply at 45-46.

will not be perceivable by end users.[262] Pactel succinctly states that it uses standardized network interfaces.[263]

141. US West specifies that interconnection of its enhanced services operation will be based on general equality with competitive ESPs, which it calls "virtual collocation." It states that under its concept of "virtual collocation," US West will achieve interface comparability with other ESPs, because it will treat its affiliated enhanced service operations as if it were located "off [the] premises" of its regulated operations.[264]

b. Positions of the Parties

142. Some commenters contend that the plans provide insufficient technical information to permit reasoned evaluation of the BOCs' compliance with this parameter.[265] Based on a plan-by-plan analysis, Tymnet argues that the plans (except possibly for Ameritech) rely on conclusory allegations that interface equality will be provided, rather than supplying the actual technical specifications necessary for independent review. Tymnet acknowledges, and NTIA contends, however, that Ameritech's approach of supplying a list of references of documents containing technical specifications may be sufficient.[266] MCI states that technical specifications and interface standards are required for a proper analysis of whether the plans comply with our requirements.[267] ESC states that BOCs must augment standard interfaces with such components as higher-bandwidth and processor-to-processor interfaces having functionality at the higher functional "layers" specified in ESC's generic ONA plan.[268] Siemens disagrees with these criticisms and asserts that each BOC plan includes well-defined standard hardware and software interfaces for all ESPs.[269]

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262 SWBT Plan at 116-119.

263 Pactel Plan at 38-39.

264 US West Plan at 336-340

265 Tymnet Comments at 23-26; MCI Reply at 6; NTIA Reply at 14; Joint Parties at 5.

266 Tymnet Comments at 26; NTIA Reply at 14.

267 MCI Reply at 6.

268 ESC Comments at 10-11.

269 Siemens Comments at 12.

c. Discussion

143. Although commenters criticize the plans for not specifying the technical documents that describe interface for ONA services, these commentators do not show that any BOCs employ or propose to employ unequal interfaces. This suggests that the significance attached to any information that is presently unavailable in the plans may be overstated. We approve the plans' treatment of this CEI parameter, on the condition that BOCs other than Ameritech amend their plans by May 19, 1989, to provide a list of documents containing interface information that apply for their initial ONA services. We see no need to postpone approval of this aspect of the plans pending the receipt of the lists. Most ONA services are existing services for which techrical information is already available, and the BOCs are bound by the network disclosure rules to disclose information regarding new services. ESC asks us to evaluate the functionality of certain interfaces rather than the equality of interfaces. This request is beyond the scope of our CEI requirements.[270]

2. Technical Characteristics

144. The Phase I Order requires that each BOC offer basic services to ESPs with technical characteristics that are equal to those of the basic services the BOC utilizes for its own enhanced services. These characteristics include, but are not limited to: transmission parameters, such as bandwidth and bit rates; quality, such as bit error rate and delay distortions; and reliability, such as mean time between failures.[271] The Phase I Reconsideration stated that the standard "does not demand impossible or grossly inefficient over-engineering of the network so that absolute equality is always achieved." We specifically recognized, for example, that the signal level of an analog data connection will decrease to some extent with the loop distance from the central office.[272]

a. The BOC Plans

145. Ameritech states that it will ensure high technical quality by installing and maintaining BSA connections for all ESPs according to the appropriate standardized procedures and technical performance objectives for

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270 IDCMA and Hayes raise a "patented interface" issue relating to the interface functionality parameter that we discuss infra, section XI C.

271 Phase I Order, 104 FCC 2d at 1041, para. 160.

272 Phase I Reconsideration Order, 2 FCC Rcd at 3048, paras. 92 and 87.

those basic services.[273] Bell Atlantic represents that it can ensure technical equality for all ESPs because distance is not a factor for digital transmissions, and because its planned architecture is "nodal" in structure -- that is, it will route communications for its affiliated operations and competitive ESPs through a single node.[274] According to BellSouth, it will ensure equal technical quality through "nondiscriminatory" installation, maintenance, repair, and circuit quality, and through the use of standard technical requirements.[275]

146. In discussing equality of technical characteristics, NYNEX focuses on interfaces to ESPs, stating that interface specifications for its unbundled BSAs will be the same as those available for non-collocated BSAs. It states that all of its BSAs are designed to assure conformance with interconnection specifications described in nationally accepted technical references and publications.[276] Pactel does not represent that it will provide equality in technical characteristics, but notes that an ESP's location may affect its ability to deliver network capabilities on a technically equal basis, and that distance from the central office and the type of service required may demand technical differences in methods of delivery.[277]

147. In contrast, SWBT states that it will provide technical characteristics uniformly with no end user-perceptible inequality. It lists three documents that contain technical specifications regarding technical characteristics.[278] US West states that ESP customers will not perceive any difference in BSE service quality.[279]

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273 Ameritech Plan at 74.

274 Bell Atlantic Plan at 66-68.

275 BellSouth Plan at 50. It will also evaluate unaffiliated ESPs' service requests to ensure that the ESP requests are technically equivalent to the service request of its affiliate.

276 NYNEX Plan at 74-75. NYNEX states that the documents listed by Ameritech also contain technical specifications for NYNEX's interfaces. NYNEX Reply at 47-50.

277 Pactel Plan at 40-41.

278 SWBT Plan at 119-120.

279 US West Plan at 347.

b. Positions of the Parties

148. Several commenters argue that the plans provide insufficient technical information to permit a reasonable assessment of equality in technical characteristics.[280] In addition, Hello, Inc. states that the BOCs should provide detailed "facts and procedures" as to how the BOC's concluded that they will provide technical equality.[281] IDCMA requests technical details on how the BOCs will implement BSAs and BSEs, including specifications on signal definition.[282] US Sprint contends that Pactel has failed to meet this parameter, by merely stating that ESP location may affect its ability to deliver network capabilities on a technically equal basis.[283] Tymnet and NTIA suggest that Ameritech's approach of providing references to relevant technical documents may be a sufficient response to their request for technical specifications. Siemens defends the BOCs and argues that the BOCs demonstrated that technical characteristics will be identical for all ESPs. Siemens states that since the ONA networks are largely nodal in nature, no performance differentiation should occur.[284]

c. Discussion

149. We approve this aspect of the plans on the condition that the BOCs other than Ameritech amend their plans by May 19, 1989, to provide a list of documents containing interface information and technical characteristics. We see no need to postpone plan approval pending the receipt of the lists because most BSAs and BSEs are existing services for which technical information is already available. Moreover, the BOCs are bound by network disclosure rules to disclose information regarding new services. In addition, we require Pactel to amend its plan to state the conditions under which ESPs not affiliated with it will receive ONA service with technical characteristics that are equal to those that its ESP operation receives. While the Phase I Reconsideration specifically recognized that there may be some decrease in signal level for analog transmissions as distance from the central office increases, Pactel should provide more assurance that technical equality as defined in our orders will be available to ESPs.

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280 Tymnet Comments at 25; Hayes Reply at 4; MCI Reply at 6; NTIA Reply at 14.

281 Hello Comments at 6.

282 IDCMA Comments at 12.

283 US Sprint Comments at 25-26.

284 Siemens Comments at 12-13.

3. Minimization of Transmission Costs

150. The Phase I Order declined to require the BOCs to provide collocation opportunities to ESPs. Instead, we required BOCs to provide interstate facilities that minimize transmission costs. We stated that loop or trunk multiplexing is one technique for minimizing such costs and that collocation is another option, and required carriers to demonstrate what steps they would take to reduce transmission costs for competitors.[285]

151. The Phase II Reconsideration held that BOCs could satisfy our requirement to minimize transmission costs by offering price parity. We said that "carriers need only minimize transmission costs through some means or charge themselves the same rates that they charge others."[286]

a. The BOC Plans

152. Ameritech states that it will satisfy this parameter by providing absolute price equality for all ESPs. It also states that it will continue to serve its customers at the lowest possible cost, citing its current reliance on multiplexing, hubbing, high capacity fiber optics, and other techniques designed to minimize the costs of service.[287]

153. Bell Atlantic contends that we have held that a BOC can satisfy this parameter by attributing full tariffed rates to its own enhanced information storage and processing services, and it proposes to do so. It claims that it has also undertaken extensive analyses to assess the technical alternatives under current network technology for reducing ESP's costs of accessing the local network, and has found no cost-effective method of further deaveraging rates.[288]

154. BellSouth notes that minimizing overall costs has always been part of its network planning and design functions. In addition, it proposes to minimize costs for access link facilities between the ESP location and their home serving wire center by adopting a mileage band concept. It claims

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285 Phase I Order, 104 FCC 2d at 1042, para. 164. The Phase II Reconsideration reaffirmed that multiplexing is not mandatory to minimize transport costs. Phase II Reconsideration, 3 FCC Rcd at 1155, paras. 32-33.

286 Phase II Reconsideration, 3 FCC Rcd at 1157, para. 49. See also id. at para. 34; Phase I Further Reconsideration, 3 FCC Rcd at 1141, para. 46.

287 Ameritech Plan at 90-92.

288 Bell Atlantic Plan at 81.

that its mileage bands match the approximate break points for the cost-effective placement of different technologies and that while copper facilities are normally the most economical facility for shorter access links, the use of "carrier facilities" (a form of multiplexing) become economical as distance increases. By using distance-sensitive access links in conjunction with concentration equipment, BellSouth states that the ESP can purchase efficient, cost effective facilities for transmission.[289] The BellSouth reply also proposes to offer a number of multiplexing options to minimize transport costs in conjunction with the distance-sensitive access links.[290]

155. According to NYNEX, it will ensure that its collocated enhanced services operations take BSAs at the same prices as its non-collocated competitors. It also will minimize interoffice transmission costs by technical means such as multiplexing. It states that its proposed BSAs incorporate multiplexing and other transmission cost minimization in a variety of ways.[291]

156. Pactel states that it has been unable to find a technological alternative that is more cost-effective than existing copper facilities for the vast majority of transport and access needs.[292] Pactel states that it will purchase BSEs and BSAs at tariffed rates available to all ESPs.[293] It states that it hopes to meet the need for "virtual collocation" by offering distance-banded pricing. It proposes to take ONA services priced within the first band.[294]

157. SWBT states that in the event that it offers collocated enhanced services, it will probably charge its ESP operation an averaged access link charge that is the same as that applied to non-collocated ESPs. Nevertheless, it claims to have designed its initial set of BSAs and BSEs to produce opportunities to reduce ESPs' access link costs, by making available

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289 BellSouth Plan at 64-65. In an Attachment to its Plan, BellSouth briefly describes three basic concentration BSEs that it proposes. Id., Attachment B at 1.

290 BellSouth Reply at 26.

291 NYNEX Plan at 78-82. NYNEX reasserts its intention to offer price parity and technical means such as multiplexing to satisfy its requirement to minimize transmission costs. NYNEX Reply at 22.

292 Pactel Plan at 49.

293 Id. at 40.

294 Pactel Reply at 29.

loop or trunk multiplexing.[295] It clarifies in its reply that its present intention is to forego the "short wire" discount for any collocated enhanced service that it offers, but that it is "conceivable" that in some isolated instance in the future it will not do so. In that case, however, it states that it will nonetheless comply fully with the minimization of transmission cost requirements.[296]

158. US West reiterates that it will minimize transmission costs through its version of "virtual collocation" -- by which its enhanced services will access the network "as if" located off-premises, and pay the same access rates as non-collocated ESPs. It states that this plan gives it an incentive to reduce transmission costs for all ESPs. It also notes several developments that, it claims, have reduced transmission costs outside the context of ONA, including digital central office switches, private branch exchange (PBX) equipment, and its Message Delivery Service.[297]

b. Positions of the Parties

(1) General Policy Issues

159. Some parties contend that the price parity requirement by itself is insufficient to prevent anticompetitive behavior by the BOCs.[298] ADCU and CONAP specifically argue that, with a price parity requirement, this Commission must require that rates for ONA services be cost-based.[299] Those commenters argue that without such a requirement, BOCs could unilaterally raise prices for ONA services, thereby lowering profit margins for all ESPs, including their own enhanced operations. ADCU argues that these lower margins would not be harmful for an integrated carrier and enhanced service supplier like a BOC, whose monopoly operations would experience increased revenues, but could be very harmful for competing ESPs.[300] The Joint Parties state that price parity alone does not guarantee just, reasonable and nondiscriminatory

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295 SWBT Plan at 120-122.

296 SWBT Reply at 54-55.

297 US West Plan at 353-359.

298 See e.g., NTIA Comments at 29; ADCU Comments at 31-35.

299 ADCU Comments at 31-35; CONAP Comments at 4; CONAP Reply at 10-11.

300 ADCU Comments at 29-35; US Sprint Reply at 8-9; IDCMA Comments at 34-35; CONAP Comments at 59. Cf. ICA Comments at 7 (by setting prices artifically high, the BOC can preclude competitors from offering a new enhanced service until the BOC itself is ready to offer the services).

rate levels.[301] According to CompuServe, if such rates are above cost, prices in a price parity environment are likely to be anticompetitive because cost shifting between regulated and unregulated accounts will not be detected.[302]

160. US Sprint believes BOCs are likely to overprice under a price parity requirement, because in most cases, ESPs that provide new and innovative services would have "shallower pockets" than the BOCs and would be unable to provide such enhanced services on an uneconomic basis for a significant period of time.[303] In addition, some parties also oppose our use of price parity to satisfy the minimization of transmission costs requirement. Dun & Bradstreet states that the minimization of transmission costs parameter is different from a price parity requirement, since it is designed to control the monopolist's incentive to price as high as the market will bear.[304] Parties also differ over whether a "virtual collocation" requirement, in which we would require BOCs to charge an averaged rate for locations near a central office, would be preferable to a price parity requirement.[305]

161. SWBT responds that this Commission's technical equality requirements for ONA, and the monitoring and reporting associated with them, control BOC discrimination against competing ESPs in the provision of ONA services. SWBT argues that it is implausible that BOCs would intentionally

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301 Joint Parties Comments at 4.

302 CompuServe Comments at 33 n. 81.

303 US Sprint Reply at 8-9. CONAP states that under a price parity regime, a BOC would be able to engage in potentially predatory behavior resembling a classic "price squeeze" between "wholesale" and "retail" prices. CONAP Comments at 60-61. CONAP also states that under price parity, a BOC's affiliated enhanced service would be able to take each basic service at the lowest possible rate so long as that rate is offered to at least one customer, even if no customer is able to take all the basic services at the same rates as the BOC attributes to its affiliates. Id. at 64-66.

CONAP also argues that Commission approval of parity pricing, while disapproving virtual collocation, would be arbitrary and capricious. As an alternative to parity pricing, CONAP recommends collocation or virtual collocation, whereby all of the connections within the same mileage band would be subject to the same transport rate. CONAP Reply at 10-12 & n. 15.

304 Dun & Bradstreet Comments at 23.

305 See, e.g., CompuServe Comments at 37. See also CONAP Reply at 14; ESC Comments at 12-13.

inflate prices so that their enhanced service operations would also have to pay in order to drive competitors out of the market. It states that BOC shareholders would never permit indefinite offering of an enhanced service at a loss. Moreover, SWBT contends, it is unreasonable to assume that state public utility commissions would approve inflated rates. SWBT also notes that such blatantly anticompetitive conduct would expose a BOC to antitrust liability.[306] NYNEX responds to the criticism that price parity simply guarantees that all ESPs will pay unfair prices for ONA services, by stating NYNEX will keep prices for basic services as low as possible in order to stimulate subscribership from ESPs and increase network usage by end users.[307]

162. Commenters also claim that, generally speaking, the BOCs fail to present concrete evidence of procedures that minimize transmission costs.[308] They contend that the BOCs have relied on existing services rather than offering new services to minimize transmission costs.[309] For example, AICC states that the Phase I Order requires more than reliance on historical modes of operation to minimize transmission costs.[310] API-Wells Fargo states that Pactel's reliance on copper transmission facilities is unacceptable. It states that in a pending rate case before the California Public Utilities Commission, Pactel sought to justify its revenue requirement increase request by contending, inter alia, that its depreciation rates had been outstripped by its modernization plan to convert to digital and fiber optic technology.[311] Siemens, however, states that each BOC lists several alternative mechanisms by which transmission costs could be minimized.[312]

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306 SWBT Reply at 55-58.

307 NYNEX Reply at 42.

308 ADAPSO Comments at 56; AICC-Bell Atlantic Comments at 10; AICC-BellSouth Comments at 11; AICC-NYNEX Comments at 10; AICC-Pactel Comments at 8-9; AICC-SWBT Comments at 12; Hello Comments at 18.

309 AICC-Bell Atlantic Comments at 10; CompuServe Comments at 31; MCI Comments at 19.

310 AICC-BellSouth Comments at 11; See also AICC-Ameritech Comments at 5-8; AICC-Bell Atlantic Comments at 10-12; AICC-NYNEX Comments at 8-11 & n. 8. AICC also supports collocation as a cost minimization technique. See e.g. AICC-Ameritech Comments at 5-8.

311 API/Wells Fargo Comments at 4-6. See also AICC-Pactel Comments at 27, 6-8.

312 Siemens Comments at 13.

(2) Application of Price Parity to the Mininimization of Transmission Costs

163. While, as noted above, a number of commenters criticize our policy concerning price parity and its interaction with other pricing policies, various parties criticize BOC proposals, most notably BellSouth's, that use distance-sensitive pricing for access links or other transmission services.[313] Several commenters contend that BellSouth's transmission services will employ a "zero" mileage band that will only apply to its own collocated enhanced service operations.[314] Telenet, while finding price parity acceptable in principle, claims that BellSouth, US West, and possibly Pactel, offer price parity only with an initial short mileage band.[315] US Sprint states that SWBT and Pactel should clarify that those carriers intend to assess the same rates to BOC enhanced service operations as to ESP competitors.[316] ATSI complains of US West's intention to take service in its first distance-sensitive band of one mile, stating that this substantially diminishes the utility of US West's virtual collocation approach.[317] It also observes that SWBT states that it might, at some point in the future, take advantage of "short wire" efficiencies, which, ATSI claims, will confer a competitive advantage on SWBT's own enhanced operations, and suggests that this Commission should suspend and investigate any SWBT tariff that advantages SWBT affiliated operations.[318]

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313 See, e.g., Telenet Comments at 47 & n. 40; US Sprint Comments at 23.

314 ADAPSO Comments at 40; CompuServe Comments at 35-36; Dun & Bradstreet Comments at 21.

315 Telenet Comments at 47 & n. 40.

316 US Sprint Comments at 22-23. AICC requests NYNEX to clarify that under its price parity proposal, charges for calls within wire centers will not be mileage-based. AICC-NYNEX Comments at 8-11 & n.8, 14-15 & n.10. In its reply, NYNEX states that its ESP operations would incur access charges within wire center districts where its nodes are deployed and charges for any required interoffice transport between nodes. NYNEX Reply at 43. It states that for the vast majority of wire center districts, BSAs are predominantly priced on a non-distance sensitive basis and represent averaged rates. Id., n.71.

317 ATSI Comments at vi, 22-24; ATSI Reply at 2 & n. 49.

318 ATSI Comments at vi, 22-24; ATSI Reply at 2 n.49, citing SWBT Plan at 121, Phase I Further Reconsideration, para. 46.

164. Parties claim that even those price parity proposals that do not include distance-sensitive pricing are ambiguous.[319] ADAPSO states that such plans fail to discuss how many BSA access lines would be imputed at each central office to a BOC's enhanced service operations. ADAPSO notes that an ESP with high quality standards would want more lines, in order to get fewer busy signals, than an ESP with lower quality standards.[320] ADAPSO asserts that, under a price parity proposal like that of NYNEX, a BOC could, for example, charge itself for one access line, while a competitor with the same traffic volume might need 20 such lines.[321] NYNEX replies that in such a case, it would determine the number of access lines needed to meet the market demand for its enhanced service as if its enhanced service operation were physically located outside the central office. Thus, NYNEX would charge itself for the appropriate 20 lines.[322] According to Tymnet, because the BOCs do not unbundle their services sufficiently and the BOC plans do not provide illustrative rates for ONA services, it is impossible to tell if the access links of BOCs and unaffiliated ESPs will be priced the same.[323]

c. Discussion

(1) General Policy Issues

165. Many of the general comments on price parity, such as the efficacy of price parity as a way of satisfying the minimization of transmission costs parameters, and the advantages of collocation or virtual

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319 See, e.g., ADAPSO Comments at 39-40; US Sprint Comments at 22-23. See also EDS Reply at 10.

320 ADAPSO Comments at 39-40 & n. 82.

321 Id. at 39.

322 NYNEX Reply at 40-41.

323 Tymnet Comments at 60-61. Tymnet also claims that price parity could be difficult to apply. It says a BOC could use a packet-switched BSA while other ESPs would use existing services or circuit-switched BSAs, with no assurance that such BSAs would be priced the same. Id. at 60-61 & n. 137. Cf. IBM Comments at 6-7 (application of access charges to certain BSAs and not to their functional equivalents may result in disparity between charges to BOC and nonaffiliated ESPs; e.g., dial-up access to the carrier's own packet service may continue at the current, usually flat-rated tariff, while dial-up access to a competing ESP's service may only be available through a "circuit-switched" BSA for which per-minute, in addition to flat-rated, charges are assessed).

collocation instead of price parity, are in the nature of requests for reconsideration of our policies regarding price parity, collocation, "virtual collocation," and pricing generally. Indeed, a petition for reconsideration of our Computer III decisions adopting the price parity requirement that raises such issues is pending.[324] We see no need to rule in this implementation proceeding[325] on the policy issues regarding price parity that parties have raised.[326]

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324 Petition for Partial Reconsideration of the Coalition of Open Network Architecture Parties, Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), CC Docket No. 85-229, Phase I and Phase II, filed April 18, 1988.

325 We also note that NYNEX included in its ONA plan a proposed amendment to our ONA rules based on price parity. See NYNEX Plan at 90. Since the Phase I Further Reconsideration, 3 FCC Rcd at 1141, adopted a price parity requirement, we see no need to address this proposal.

326 Some parties contend that there is a need to apply cost-based pricing to ONA elements in addition to a price parity requirement. As a general policy, rates for federally tariffed ONA services, like those for other interstate basic services, must be related to costs. While price parity can be an important tool in preventing unreasonable discrimination in the rates BOCs charge their competitors, it cannot alone ensure that those rates are set at levels that reflect the costs of providing basic service and that promote the efficient development of telecommunications-based industries. Moreover, as we have previously stated:

> The concept that users of the local telephone network should be responsible for the costs they actually cause is sound from a public policy perspective and rings of fundamental fairness. It assures that ratepayers will be able to make rational choices in their use of telephone service, and it allows the burgeoning telecommunications industry to develop in a way that best serves the needs of the country.

MTS and WATS Market Structure, 97 FCC 2d at 686 (1983). Application of our federal pricing principles to interstate ONA services should ensure that these services are cost-based and bring related benefits to the enhanced service industry. We are confident that state regulators share our desire to spur the development of more and better enhanced services and to permit forms of pricing of state-tariffed ONA services that are related to costs.

(2) Application of Price Parity to Minimization of Transmission Costs

166. All of the BOCs except BellSouth propose to satisfy the minimization of transmission costs parameter through the use of price parity. For purposes of compliance with this CEI parameter, we approve the price parity proposals of the BOCs[327] other than BellSouth, subject to the following qualifications for individual BOCs.

167. Some BOCs other than BellSouth, such as US West and perhaps Pactel, propose to provide distance-sensitive transmission as part of an ESP access arrangement. In approving price parity as an acceptable response to our minimization of transmission costs requirement, we recognize that precise price parity cannot be achieved with such a tariff since noncollocated ESPs will pay different amounts for access depending on their distance from the central office. While we could ensure that a BOC using a price parity approach was no better off than any competing ESP by requiring it to take access from the furthermost distance band, this would be an extreme approach that would discourage BOCs for using price parity and/or distance-sensitive pricing, results that would not be desirable. On the other hand, if a BOC takes service from an initial, very short mileage band, it will effectively obviate the "parity" aspect of its approach since, as a practical matter, few ESPs would be able to locate their facilities within that same initial band.

168. Commenters claim that US West's banded pricing approach is unacceptable because its innermost distance band, from which US West professes to take service, is one mile. We find that the goal of price parity, to ensure that ESPs can obtain services at prices equal to those for the BOC's enhanced operations, is better served if US West charges its enhanced service

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327 These BOCs, in proposing price parity, argue that there are few technical arrangements available in the short term that will minimize transmission costs for ESPs beyond those already incorporated into their service offerings. See generally supra at paras. 152-158. These BOCs contend that their ordinary network planning focuses heavily on minimizing the transmission costs of all network users, and that special "fixes" or retrofits grafted onto their network designs will only increase, not reduce, the costs of providing service to ESPs and others. Since these BOCs rely on price parity to satisfy this CEI parameter, we need not assess the validity of these observations. For the long term, however, the BOCs must include the goal of "minimization of transmission costs" in their planning. Future network technologies, such as CCS7, ISDN, and IN/2, should be designed and deployed in ways that further our ONA goals. See infra at paras. 378-389.

operations served by a particular central office no less than it would for an ESP located two miles from that central office.[328] Two to three miles is the distance that parties most commonly referred to in requesting that we require a "virtual collocation" approach to CEI pricing in the Phase I Reconsideration proceeding. While we do not require such "virtual collocation," we find that two miles is a reasonable minimum distance for price parity associated with a distance-sensitive banded tariff. US West could accomplish this result by expanding its initial mileage band to two miles or by charging itself the rate for the mileage band that includes two miles. We require US West to amend its plan by May 19, 1989, to describe how it will comply with this requirement.

169. We also note SWBT's statement that, in the future, it may seek to use the "short wire" advantage that this Commission has permitted. Should SWBT seek to do so, it must first amend its plan to reflect any such change.[329] Moreover, while the representations Pactel makes in its description of price parity appear to be generally satisfactory, Pactel does not say whether it will actually use a banded pricing approach and does not describe how price parity would work under such an approach. We require Pactel to amend its plan by May 19, 1989 to describe its banded pricing approach, if any, in greater detail.

170. In the absence of offering price parity, BellSouth could satisfy the minimization of transmission cost parameter by offering ESPs either collocation opportunities or technical means, such as multiplexing, that minimize transmission costs. BellSouth does not propose to allow collocation for competing ESPs, but claims that it has adopted several procedures to minimize transmission costs. It proposes a distance-sensitive tariff for transmission between an ESP and its servicing central offices, which it claims will reduce costs for ESPs. It also proposes to offer ESPs a number of multiplexing options that, in conjunction with its access links, purportedly will reduce ESPs' transmission costs.

171. BellSouth does not demonstrate that a distance-sensitive transmission tariff would minimize costs to competing ESPs. Indeed, BellSouth's proposed use of a "zero-mileage" band apparently will minimize transmission costs primarily for its own collocated ESP operations.[330]

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328 The method for measuring such distances is typically specified in the particular distance-sensitive tariff.

329 SWBT would, at that time, have to demonstrate how price parity will operate for its approach or otherwise show how it satisfies our minimization of transmission costs parameter.

330 BellSouth states that it proposes two mileage bands: 0.1 to X miles; and greater than X miles. It also states that it currently expects "X" to fall

Moreover, BellSouth's terse exposition of the multiplexing options available to ESPs supplies no information that allows us to evaluate their utility--e.g., how widely available such multiplexing would be for competing ESPs, how the proposed multiplexing meets ESPs' needs, and the extent to which such multiplexing will actually reduce ESPs' transmission costs. In our view, the combination of (a) a distance-sensitive tariff with a zero-mileage band, and (b) the denial of collocation opportunities to competing ESPs, creates a special need for a BOC to make a clear showing that it will provide effective, alternative means of minimizing transmission costs. BellSouth has failed to do so. We require BellSouth to amend its plan on May 19, 1989 to conform to one of the approved proposals discussed below for minimizing transmission costs, or to explain in detail how its multiplexing proposals in conjunction with its proposed tariff structure will minimize transmission costs for other ESPs.

172. Finally, parties question how BOC price parity proposals will operate in practice. ADAPSO argues that, because, for example, different ESPs might have different quality standards, a BOC enhanced service operation could take a different number of lines than a comparable nonaffiliated ESP, and asks how price parity will operate so that the BOC charges its enhanced service operation for the correct number of lines. We believe that NYNEX states an acceptable standard for applying price parity principles: a BOC should charge itself for the number of access lines and other ONA services needed to meet the market demand for its enhanced service operations as if those operations were physically located outside the central office.[331] We

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between 1 and 3 miles. We infer that there is a "zero-mileage" band, from 0 to 0.1 miles, that is reserved for BellSouth's own collocated enhanced services operations. See BellSouth Reply at 30. We do not preclude distance-sensitive tariffs for transmission services. As stated below, US West's price parity proposal, which incorporates distance-sensitive mileage bands, requires modification so that US West's enhanced service operations take transmission at the rate charged for ESPs in the two-mile band. As modified, this price parity approach satisfies our minimization of transmission cost requirement. US West, however, unlike BellSouth, does not establish a zero-mileage band that apparently confers benefits only on itself.

331 For the near future, we see few problems with enforcing this requirement, since, from our experience with BOCs offerings in the context of their CEI plans, it appears that few enhanced functions are collocated with central office switches without some sort of actual physical connection, albeit "short wire connections," between these enhanced service functions and basic switches. Even protocol processing functions are associated with specific ports through which basic services like packet transmission are provided. Thus, it is relatively straightforward to determine how many physical connections exist, and what their functional characteristics are, for purposes of charging for equivalent access services and BSEs.

recognize, of course, that different ESPs may want to obtain different quantities of basic services, in order to offer enhanced services of different quality, but such decisions are a matter of business judgement for each ESP. We require that the BOCs that adopt price parity to minimize transmission costs pay for their ONA services according to the standard established above.[332]

C. Other Issues

1. Collocation

173. The Phase I Order stated:

> [We] decline to mandate that carriers provide collocation opportunities for other enhanced service providers. Rather, we encourage carriers to utilize collocation techniques as an option in satisfying our general CEI standards.[333]

We found that while collocation is an obvious way to reduce transport costs, "other ways to minimize such costs may exist that could be more cost-effective." We also recognized practical problems in implementing collocation, including space availability, security, operations, and maintenance. We stated that even if these problems could be resolved,

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332 Of course, there may be some enhanced services, particularly in the future, that are so completely merged into a switch or other equipment that provides basic services that it could be difficult to apply this standard. We are not adopting guidelines for such hypothetical situations at this time.

Parties also claim that BOCs may use packet-switched BSAs when competing ESPs use circuit-switched or other existing access arrangements to provide the same service, thus making price parity difficult to apply. The record does not demonstrate that this is a likely scenario, nor that this scenario would have anticompetitive effects. The access arrangements at issue are available to the enhanced service operations of both the BOCs and their competitors. Thus, each ESP is free to determine for itself which arrangement is most efficient for its particular goals. For this reason, so long as ONA services are available to competing ESPs as well as the BOC's enhanced operations, a BOC taking such services at tariffed rates satisfies our price parity requirements, regardless of the number of competitors actually availing themselves of such arrangement.

333 Phase I Order, 104 FCC 2d at 1037, para. 151.

collocation could impose additional costs that could offset any savings in transmission costs. We noted that:

> the space-availability issue [is] particularly troubling, since in a competitive enhanced services market the demand for space in which to collocate may well outstrip the supply. This could be particularly true in urban areas, where available office space may be scarce and the enhanced services market may be quite active.[334]

Finally, we expressed a concern that mandatory collocation might not be the most efficient method available to ensure CEI, and stated that we did not want to chill the development of new, efficient, technologies by an overly restrictive approach to mandatory collocation.[335]

a. Positions of the Parties

174. A number of commenters urge us to revisit our decision and require the BOCs to provide collocation opportunities to unaffiliated ESPs.[336] Some attempt to reargue the benefits of mandatory collocation by stating that collocation is economically efficient.[337] Some state generally that collocation is necessary to ensure a "level playing field" between affiliated and non-affiliated ESPs. For instance, MCI states that a lack of collocation will undermine the "equal access" principles of ONA.[338] IDCMA states that without mandatory collocation, BOCs will be able to manipulate the pricing or the provision of access, switching, or transport services to ESPs in order

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334 Id. at para. 152.

335 Id. at para. 153.

336 ADAPSO Comments at 26; ADCU Comments at 21-24; CBEMA Comments at 35; CCTU Comments at 9; CompuServe Comments at 29-37; Dun & Bradstreet Comments at 21-24; EDS Reply at 10; Hatfield Comments at 70-78; IDCMA Comments at 26-32; MCI Comments at 18; NCR Comments at 1; Telenet Comments at 47-51.

337 ADAPSO Comments at 26; CCTU Comments at 9; IDCMA Comments at 27; NCR Comments at 1. Parties also argue that the BOCs should offer collocation as a way to minimize transmission costs for ESPs. See e.g., AICC-Ameritech Comments at 5-8.

338 MCI Comments at 18.

to gain an advantage over competing ESPs.[339] Similarly, Telenet states that collocation is necessary to ensure technical parity.[340]

175. Other commenters attempt to reargue issues concerning the feasibility of providing collocation. Hatfield states that the arguments against collocation reflect an unwillingness by the BOCs to cooperate with ESPs rather than any overriding technical or economic barriers. It notes that US West originally indicated that it would allow collocation, and that AT&T has offered collocation, implying that collocation is feasible.[341] CompuServe argues that collocation is completely feasible from technical, administrative, operational, and security perspectives,[342] and Telenet

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339 IDCMA Comments at 31.

340 Telenet Comments at 48. Telenet also states that the lack of mandatory collocation forces an ESP to incur a "termination liability" charge if it is required to change location. It states that a collocated BOC affiliate does not face this additional risk. Id. at 48-49.

341 Hatfield Comments at 71-73. Hatfield cites collocation of equipment in the land mobile radio context as further evidence of the feasibility of collocation. It states that land mobile radio antenna site owners routinely allow collocation of competitors' equipment because those owners recognize a financial incentive to doing so. Hatfield states that security is ensured by limiting access to pre-approved personnel and, in some cases, housing certain equipment in locked cabinets. Id. at 74-75.

Shooshan & Jackson responds that Hatfield's reliance on the land mobile radio analogy is misleading. It states that there are unique efficiencies in collocating antennas because a single location is often the best location (e.g., the highest location), and that manufacturers, not land mobile operators, often own the antenna sites so that it is natural that owners would be willing to spread the cost of their antenna site over as many customers as possible. Shooshan & Jackson also notes that there is essentially no privacy problem in the land mobile radio context because transmissions are transmitted over-the-air in unscrambled form and it is understood that transmissions can be intercepted by anyone using a low-cost scanner. Shooshan & Jackson Reply at 47-48.

342 CompuServe Comments at 37. See also Dun & Bradstreet Comments at 22.

contends that the modernization of local exchanges has increased the space available for the collocation of facilities.[343]

176. CompuServe contends that we need to reevaluate our collocation policies because none of the BOCs have volunteered to offer collocation to competing ESPs, and because we premised those policies on a belief that BOCs would do so.[344] Telenet states that collocation is required to satisfy the MFJ Court's March 7 Order requiring non-discrimination in the provision of information services by the BOCs.[345] ADCU states that the collocation issue debated in Computer III concerned placement of ESP "boxes" or processors in a central office. It states that "collocation" could also mean the termination in a central office of transmission cables or trunks owned by a non-BOC, and argues that this form of collocation is also desirable. It contends that such collocation does not raise the space limitations and security problems that we identified as being associated with collocation of ESPs "boxes" or processors.[346] Telenet contends that the BOCs should bear the burden of demonstrating why collocation is not feasible in specific instances.[347]

177. Other parties, principally BOCs and state commissions, support our collocation decision and argue against mandatory collocation. All of the BOCs state that we have already addressed collocation, and that commenters make repetitious arguments that we should reject summarily as untimely and improper petitions for reconsideration.[348] The BOCs also generally contend that the potential technological and pricing disadvantages to non-collocated ESPs are adequately addressed by the BOCs' compliance with our minimization of transmission cost requirements.[349]

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343 Telenet Comments at 50. Hello asks Bell Atlantic to clarify what operational, administrative, and security problems are raised by collocation. Hello Comments at 17.

344 CompuServe Comments at 30-31.

345 Telenet Comments at 48.

346 ADCU Comments at 22-23.

347 Telenet Comments at 50-51.

348 Ameritech Reply at 59-62; Bell Atlantic Reply at 6-7; BellSouth Reply at 26-28; NYNEX Reply at 21-30 (also noting that the MFJ Court and DOJ have also rejected mandatory collocation); Pactel Reply at 10-11; SWBT Reply at 58-59; US West Reply at 92-97.

349 Ameritech Plan at 59-60; Bell Atlantic Reply at 6-7; BellSouth Reply at 26-28; NYNEX Reply at 27-29.

178. In addition, NYNEX argues that the ESPs desire collocation to circumvent regulatory pricing policies that average costs to foster universal service. It contends that collocation will cause significant operational problems, including space availability, facility security, and the privacy of communications.[350] SWBT states that the BOCs have been collocating protocol conversion equipment in their central offices for nearly three years, under the terms of Computer II waivers, and that there have been no formal complaints alleging that competing, noncollocated packet service providers have been receiving inferior connections to the BOCs' networks.[351] US West argues that it has conducted limited trials of carrier and ESP collocation in several locations, but that mandatory collocation would subject collocation to unnecessary and potentially burdensome regulatory terms and conditions. It states that commenters view collocation as including the absolute right of a competitor to "set up shop" as an exchange carrier within telephone company buildings, which it characterizes as unreasonable.[352] SWBT and US West contend that mandatory collocation raises constitutional taking issues under the Fifth Amendment.[353]

179. Shooshan & Jackson states that we have already decided the collocation issue. It says that collocation raises serious privacy and security concerns, including an increased probability of wiretapping and accidental or intentional damage to essential facilities. It states that there is no evidence that collocation is required for technical equality, and that price parity neutralizes any price advantage for a collocated affiliate.[354]

180. Ameritech States oppose mandatory collocation until technical and other standards for collocation are addressed in a separate rulemaking.[355] New Jersey argues that collocation raises clear problems in space availability, security, operations, and maintenance.[356] New England states

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350 NYNEX Reply at 21-30.

351 SWBT Reply at 58.

352 US West Reply at 92-97.

353 SWBT Reply at 58-59; US West Reply at 92-97.

354 Shooshan & Jackson Reply at 44-49.

355 Ameritech States Comments at 10. See also Ameritech States Reply at 24-25.

356 New Jersey Comments at 5; New Jersey Reply at 5.

that ESPs motivation for collocation in many cases is to avoid state pricing policies that require the inclusion of subsidies in certain prices to encourage universal service.[357] New York contends that physical collocation is not necessary for the unbundling of ONA services.[358] Virginia argues that price parity is an acceptable alternative to collocation.[359] NCTA opposes mandatory collocation and contends that access to small exchange carrier offices will pose a special problem in the event of collocation, since such offices are unattended.[360]

b. Discussion

181. In light of the extensive attention that we devoted to the collocation issue in the Computer III proceeding, we will not reconsider our mandatory collocation policies.[361] We do not find the substantive claims advanced for reconsideration to be persuasive. The majority of commenters that argue for collocation merely restate general claims about the benefits of collocation that were previously before us. Accordingly, these claims do not present us with a compelling reason to revisit our collocation decision. Nor are we persuaded that we improperly rejected mandatory collocation. Although Hatfield attempts to rebut the practical arguments against mandatory collocation (space, security, access, maintenance, etc.), and presents examples of collocation in other areas of telecommunications, the BOCs and Shooshan & Jackson present countervailing arguments that convince us of the wisdom of our decision not to require collocation.

182. Some commenters claim that we should revisit the collocation issue because we previously failed to address the technical equality issues raised by collocation.[362] This claim is not persuasive. We address and ensure

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357 New England Reply at 9-10.

358 New York Reply at 8.

359 Virginia Reply at 3.

360 NTCA Reply at 3, n. 3.

361 No party filed a petition for reconsideration of our decision on the collocation question in the Phase I Order.

362 ADCU attempts to distinguish collocation of ESP processors or "boxes" on BOC premises from the termination on BOC premises of cables or trunks owned by third parties. We treat the question of the termination on BOC premises of cables or trunks owned by third parties as an unbundling issue in Section IV B.

technical equality of ONA services through a number of CEI parameters that directly address technical characteristics.[363]

183. Finally, the MFJ Court's March 7 Order does not give us reason to revisit the mandatory collocation issue. Restrictions that the MFJ Court has imposed on the BOCs do not affect our review of these carriers' ONA plans and our enforcement of the antidiscrimination aspects of the ONA rules.

2. CEI Plans

184. The Common Carrier Bureau has approved a number of CEI plans. Most of those plans should be in general compliance with the provisions of this order. However, in certain circumstances, the Bureau approved sections of CEI plans on the condition that the plan be modified, if necessary, to conform with this order. Accordingly, we require BOCs with approved CEI plans to examine those plans against the requirements of this order and to bring the plans into compliance with this order. In addition, we direct the BOCs to file a letter with the Bureau notifying it of any sections that have been brought into compliance. CEI plans need only be brought into conformance with aspects of ONA plans that have been finally approved. That is, if we today approve a section of an ONA plan, the BOC must now bring its corresponding CEI plan section into conformance with this order. A number of CEI plans are currently pending. BOCs need not file amendments to those plans, but we direct the Bureau, in evaluating those plans, to mandate conformance with the procedures and rules that we adopt today.[364]

VII. UNIFORMITY

A. General Perspectives

1. ONA Requirements

185. The Phase I Order declined to initiate a separate proceeding to develop specific network designs for ONA. We concluded that ONA should

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363 The contention that our original decision not to require collocation was premised on a conclusion that any or all of the BOCs would voluntarily offer collocation is unfounded.

364 CEI plans filed subsequent to this order must conform to the applicable provisions of this order. We direct the Bureau not to entertain comments on individual CEI plans that attempt to relitigate issues that we have decided in this order. As such, we expect the guidelines contained in this order will facilitate the CEI plan review process.

be developed in the the private sector "where interested parties can participate in the development of Open Network Architectures that are suited to specific enhanced and basic service markets."[365] We stated that private organizations, such as the T1 Committee and others, could play a role in resolving standards issues and ensuring that relatively minor variations among carriers' specifications for BSEs would not adversely impact efficiency or competition.[366] We concluded that "by adopting general requirements rather than mandating a particular architectural implementation, we wish to encourage development of the most efficient interconnection arrangements possible that will satisfy our regulatory goals."[367]

2. Positions of the Parties

186. A number of commenters express concern over what they describe as a lack of uniformity among the ONA plans. ADAPSO states that the lack of uniformity causes problems for national ESPs that range from "annoyances" to major obstacles that prevent ONA implementation in a way that meets ESP needs.[368] ADT and DEC characterize the ONA plans as a "hodgepodge" of offerings that make it difficult for ESPs to know whether capabilities offered in one BOC territory are technically equivalent or compatible with those offered under the same or different names in another BOC territory.[369] AICC states that its will be "difficult to promote a nationwide network" when network architectures are "radically different" from region to region.[370] CONAP expresses similar concerns over what it terms the potential "balkanization" of the network.[371] CCTU states that the lack of uniformity could have broad and detrimental consequences on the industry generally and on our ability to administer ONA effectively.[372] CBEMA, IBM, and MCI, argue that the absence of uniformity can inhibit the nationwide deployment of enhanced services.[373]

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365 Phase I Order, 104 FCC 2d at 1067, para. 219.

366 Id.

367 Id. at 1064, para. 213.

368 ADAPSO Comments at 61.

369 ADT Comments at 8-9; DEC Comments at 10.

370 AICC-Ameritech Comments at 18.

371 CONAP Comments at 37-38.

372 CCTU Comments at 3-4.

373 CBEMA Comments at 32; IBM Comments at 13; MCI Reply at 5.

187. CompuServe states that the lack of uniformity will create difficult business, marketing, and service availability problems.[374] ICA states that the planning, engineering, installation, and management of national telecommunications networks is made far more efficient when the telecommunications manager is able to obtain uniform BSE technical information, price information, terms and conditions, and ordering and installation information.[375] Hayes argues that inconsistent BSE offerings will seriously undermine the efficient operation of the enhanced service and communications hardware and software markets.[376]

188. Other parties, however, assert that the plans provide substantial uniformity. For example, Ameritech states that the plans reflect greater uniformity than the rhetoric of the commenters would indicate. It cites the BOCs' Report No. 1, released October 1987, which analyzes the plans and concludes that eighty-two technical industry requests are met by one or more BOCs as of the fourth quarter of 1989, while the remaining 32 industry requests are not technically feasible at that time.[377] US West states that even though the BSEs may seem superficially dissimilar from region to region, the BSEs have an underlying technical uniformity that will enable ESPs to use them without having to reconfigure their enhanced services on a regional basis.[378]

189. Some parties stress that absolute uniformity may be unattainable or not cost effective in the post-divestiture world. These parties, principally BOCs, their consultants, and state commissions, emphasize the differences in technological capabilities among BOC networks and in market demand for particular services among regions and states.[379] Ameritech

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374 CompuServe Comments at 24-26.

375 ICA Comments at 10.

376 Hayes Reply at 11.

377 Ameritech Reply at 29-30. In addition, Report No. 1 states that 24 industry requests are met by all 7 BOCs, 13 are met by 6 BOCs, 8 are met by 5 BOCs, 7 are met by 4 BOCs, 9 are met by 3 BOCs, 12 are met by 2 BOCs, and 9 are met by 1 BOC.

378 US West Reply at 55-56. See also BellSouth Reply at 8; Shooshan & Jackson Reply at 27-29.

379 Bell Atlantic Reply at 14-15 (noting that their ONA proposals are based on two demand studies conducted by outside consultants); BellSouth Reply at 10; Illinois Reply at 2; New Jersey Reply at 2; Shooshan & Jackson Reply at

expresses concern that the push for absolute uniformity may become counterproductive, stifling choice, innovation, and flexibility.[380] Similarly, Noam states that:

> [T]otal uniformity sounds better on paper than in reality. Uniformity has its trade-offs in terms of flexibility and choice. A uniform system, like a convoy, moves at the speed of its slowest and most obstructionist participants. Without belittling the value of uniformity, one should also recognize that there also can be value in some inter-[BOC] rivalry, since diversity can give an impetus to innovation or efficiency, while economic rationality can lead in a competitive system to some convergence and coordination even in the absence of a regulatory requirement.[381]

Finally, Ameritech and Shooshan & Jackson stress that uniformity will increase over time in response to marketplace pressures to provide popular services.[382]

3. Discussion

190. We are sensitive to the need among ESPs and end users for uniformity in ONA services, since such uniformity can increase the ability of ESPs and their customers to use the nationwide network in an efficient manner. We agree, however, with the BOCs and other commenters that many of these parties overstate their complaints and ignore the considerable underlying uniformity to the plans in their current forms, as demonstrated in the BOC Special Report. Moreover, we recognize that a strict uniformity requirement would impose some costs. BOC plans are based on analyses of their different technological capabilities and customer demands. Uniformity initiatives inconsistent with these considerations may therefore be technologically infeasible, or impose costs unjustified given local customer demand. We do not wish to stifle innovation or require large expenditures to achieve uniformity if the corresponding benefits from the introduction of uniformity are negligible. As a number of commenters note, imposing absolute uniformity in such circumstances would be counterproductive and could lead to a lowest-common-denominator implementation of ONA.[383]

27-29; SWBT Reply at 48; US West Reply at 81-83.

380 Ameritech Reply at 27.

381 Noam Comments at 14.

382 Ameritech Reply at 24; Shooshan & Jackson Reply at 38.

383 While we agree with those parties that identify the AT&T divestiture as one source of a lack of uniformity in our nation's telecommunications

191. Nevertheless, based on our review of the plans and the comments, we believe that there is room for constructive movement toward greater uniformity in some aspects of the plans. Different cost/benefit considerations are applicable to different uniformity issues. For example, uniformity in the nomenclature of ONA services may pose different issues than uniformity in deployment of such services in different regions. Thus we address specific aspects of the uniformity issue separately. In Section III C we concluded that the BOCs and the industry should use the IILC to work on such issues. Specific actions that the BOCs must take are discussed below.

B. Nomenclature

1. Positions of the Parties

192. BOC ONA plans often assign different names to BSEs and BSAs with similar technical characteristics. For instance, one particular call forwarding service is described by various names, including "Call Forwarding Variable With Call Completion," "Activation of Call Forwarding With Call Completion," "Call Forward Variable," "Call Forwarding," "Activation of CFV With Call Completion," "Call Forwarding Activated By A Call From Customer to ESP," and "Call Forwarding Variable."[384]

193. Several parties advocate uniform nomenclature because they are concerned that variations in nomenclature will hamper their efforts to identify the ONA services they need to provide enhanced services on a nationwide basis.[385] In contrast, Ameritech states that identical services have long been given different names by different LECs, and claims that this

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network, we also note that current differences in technological capabilities and market conditions among and within BOC regions, which the BOCs identify as the major reasons for a lack of uniformity among their plans, largely pre-date divestiture. Thus, there undoubtedly would have been some diversity in ONA even if divestiture had not occurred. Nevertheless, it seems highly likely that a single ONA Plan filed by a non-divested AT&T would have been more uniform than the seven plans before us now. A single plan might not have better satisfied all our ONA goals than the various BOC plans.

384 ONA Plan Reference Document, BOC Contribution to IILC BSE/BSA Ad Hoc Task Force, April 20, 1988 (Reference Document) at 9.

385 ADT Comments at 7; AICC Reply at 7; ATSI Comments at 35; CONAP Comments at 32; CBEMA Comments at 32; DEC Comments at 9; Hatfield Comments at 85-86; IDCMA Comments at 11; IIA at Comments 11; IBM Comments at 14; NTIA Comments at 22; NTIA Reply at ii, 18; TCA Comments at 15; US Sprint Comments at 3; US Sprint Reply at 4; Videdotex Reply at 4.

fact has never seriously hampered national entities from obtaining the products they need.[386] BellSouth agrees and notes that, for example, its PulseLink packet switching service is substantially similar to Southwestern Bell's Microlink II, US West's Digipac, and NYNEX's Infopath services, and that these different names have not had any deleterious impact on national customers of those services.[387]

2. Discussion

194. We agree that enhanced service providers must be able to identify the basic services they need. However, we also believe that the BOCs may have legitimate business reasons for assigning different names to similar services, since, for example, some BOCs could have valuable trade names for their ONA services.[388]

195. In many instances, we believe that cross-referencing can adequately address the need for uniform nomenclature. Cross-referencing is a system by which the various names assigned by the BOCs for similar services are catalogued in an easy-to-use reference document or database. Important strides towards cross-referencing of network capabilities have already been achieved and are continuing. On April 20, 1988, an IILC Task Force released the 171-page Reference Document[389] that lists, for each of the 118 ONA services identified by Bellcore, the product name each BOC uses to offer the service. For example, an ESP that desires NC 47, "X.25 Interface to Packet Switch" can turn to page 69 of the Reference Document, which states that all seven of the BOCs offer the service, using names such as "X.25 Interface to Packet Switch," "Packet Switching BSA," "Packet Access BSA," and "Packet Switching." ESPs thus can determine with relative ease which service to request from each BOC. The IILC is also developing a national computer database to improve access to, and allow continual updating to, this type of information.

196. Despite the general utility of cross-referencing, we also believe it may be possible and useful for the BOCs to achieve greater uniformity in nomenclature for ONA services. For example, the variations in the names given the Call Forwarding feature do not appear to reflect differences in valuable trade names, but simply the different results of

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386 Ameritech Reply at 34.

387 BellSouth Reply at 11.

388 As Ameritech and BellSouth note, it is current practice to provide identical services under different names.

389 See supra note 384.

individualized attempts to assign a name to a particular service that describes its functions. ("Call Forwarding" may be a valuable trade name, but that part of the service name is uniform in all cases.) In such instances, it should be possible to establish a single name for the service without intruding on any legitimate proprietary interests.[390] We believe that the IILC is the appropriate uniformity forum, and believe that it should be responsible for the development of uniform names for ONA services, as well as for cross-referencing.[391]

C. Uniform ONA Services

1. Positions of the Parties

a. Uniform Technical Implementations of ONA Services

197. Various parties stress the need for uniform technical implementations of BSEs.[392] For instance, Hatfield alleges that the plans

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390 Even if complete uniformity is not achieved, a reduction in the scope of variation in nomenclature (e.g., from seven to two names) would be useful.

391 Various parties criticize the BOCs for assigning different classifications (BSA, BSE, CNS, ANS) to similar network capabilities. ADAPSO Comments at 61; ADT Comments at 7; AICC-Bell Atlantic Comments at 13; AICC-BellSouth Comments at 14; AICC-Pactel Comments at 12; AICC-SWBT Comments at 14; AICC-US West Comments at 14; AICC Reply at 7; API Comments at 12; ATSI Comments at 35; Ameritech States Reply at 11; AT&T Comments at 20-23; CompuServe Comments at 24; DEC Comments at 8; Dun & Bradstreet Comments at 33; Hatfield Comments at 86; Illinois Reply at 3; TCA Comments at 15; Telocator Comments at 5; US Sprint Comments at 3. These parties generally complain that the lack of uniformity in the BOC's use of the ONA model will hamper ESP efforts to provide services across BOC regions on a nationwide basis. We discuss ONA classifications supra at Section IV C, and establish requirements for the utilization of various classifications. To the extent that these rules allow for nonuniform classifications of some network capabilities, we note that the classification issue appears to be conceptually similar to the nomenclature issue, discussed above. That is, cross-referencing efforts such as the development of a "User's Guide" should be sufficient to address differences in classifications, by allowing ESPs to determine easily how a ONA service is classified in different regions, and under what conditions the ONA service is offered. With this information, nationwide provision of enhanced services should be facilitated despite differences in classifications. Accordingly, we request the IILC to undertake a cross-referencing effort for ONA services that BOCs classify differently in their implementation of the ONA model.

392 ADAPSO Comments at 62; ADCU Comments at 53; AT&T Comments at 23-24;

contain "at least a few instances of technical inconsistency" that, it claims, "will have the effect of not only requiring a nationwide ESP to meet a number of different specifications, but also virtually insures that there can be no transportability of ONA services across BOC boundaries without the addition of an expensive gateway--if at all."[393] Three parties cite inconsistencies in the provision of CNI,[394] and one party cites an inconsistency in the provision of ANI.[395] Hayes states that technical inconsistency will make it impossible for equipment manufacturers to offer communication products that can be used throughout the country without sacrificing performance.[396]

198. In response, Shooshan & Jackson contends that differences in technological capability may be more "imaginary" than real, and argues that alternative technical applications of an ONA service, such as CNI, reflect desires by ESPs to take services in a variety of manners.[397] Moreover, AT&T conducted a study entitled "Inter-LATA Transport of BSE-Associated Information" (Transport Study) in which it analyzes the twenty-nine network capabilities that are offered by all seven BOCs and concludes that interLATA transport of these services will not present serious technical or administrative problems.[398]

California Comments at 4-5; CompuServe Comments at 24; CONAP Comments at 36; Dun & Bradstreet Comments at 33; Hatfield Comments at 88-90; Hayes Reply at 12-14; New Jersey Comments at 2-3; Noam Comments at 15; NTIA Reply at 19; Telenet Comments at 21; US Sprint Reply at 4.

393 Hatfield Comments at 90.

394 Id. at 88-90; Hayes Reply at 12-14; Dun & Bradstreet Comments at 33.

395 See CONAP Comments at 36, citing Southwestern Bell's "unique" method of delivering ANI.

396 Hayes Reply at 13.

397 Shooshan & Jackson Reply at 29-33. See also Ameritech Reply at 25.

398 AT&T, Inter-Lata Transport of BSE-Associated Information, Contribution to IILC BSE/BSA Ad Hoc Task Force, June 13, 1988 at 2. Specifically, AT&T finds that of the 29 network capabilities offered by all of the BOCS, 23 can be transported with no changes, 5 require administrative changes and 1 requires a technical change to an interface. In a recent ex parte filing, AT&T states that additional technical changes may be necessary for the transportability of the remainder of ONA services. Ex Parte Letter from AT&T to H. Walker Feaster III, filed September 19, 1988.

b. Uniform Availability of ONA Services

199. Many parties also urge movement toward a uniform list of ONA services, or at least suggest that we require all BOCs to offer a "core" list of ONA services.[399] They claim that this uniform list is necessary for the national provision of ESP services. For instance, DEC cautions that variations in the availability of ONA services will undermine ESPs' efforts to offer enhanced services on a national basis. It requests that we require each BOC to explain why it cannot offer capabilities that will be provided by other regions, and to submit firm schedules for making such capabilities available.[400]

200. However, a number of parties,[401] including a number of states,[402] argue against requiring a core set of BSEs. Shooshan & Jackson states that diversity has certain benefits and is inevitable, given seven different companies with different technologies and customer demand patterns.[403] States are particularly concerned that requiring certain NCs will cause costly network innovations that are not justified in particular local markets given demand and embedded technologies. The states feel that we are not well suited to make conclusions regarding what they see as essentially matters of local concern. Moreover, an equipment manufacturer cautions that the BOCs' ability to offer uniform services, at least in the short run, is limited by the fact that it can take over two years to create a new BSE.[404]

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399 API Comments at 13-14; ADCU Comments at 52; ATSI Comments at 31; AT&T Comments at 20; CONAP Comments at 35; CompuServe Comments at 24; CBEMA Comments at 32; DEC Comments at 8; Hatfield Comments at 79-91; Hayes Reply at 10-11; IIA Comments at 11; Ameritech States Reply at 11; NTIA Comments at 17; TCA Comments at 16, n. 29. US Sprint suggests that we investigate the BSAs and BSEs by the BOCs to determine whether capabilities offered by two or more BOCs should be offered by other BOCs. US Sprint Comments at 6.

400 DEC Comments at 14-15.

401 Bell Atlantic Reply at 15; BellSouth Reply at 10; Shooshan & Jackson Reply at 26-29; SWBT Reply at 52.

402 California Comments at 7; Minnesota Comments at 6; New England Comments at 9; New Jersey Reply at 2; New York Reply at 6; Virginia Reply at 1.

403 Shooshan & Jackson Reply at 26-29. BellSouth, for example, indicates that it is not offering four BSEs that other BOCs are offering because such BSEs require capabilities provided by packet switches it has not yet deployed. BellSouth Reply at 25, n. 26.

404 Siemens Comments at 9.

c. Uniform Deployment of ONA Services

201. A number of parties advocate increased uniformity in deployment schedules for ONA services.[405] ANPA states that deployment timing should be uniform, and that great disparities will cause severe operational problems for electronic publishers providing national or regional services.[406] ATSI states the universal deployment is necessary for ESPs to provide advanced services to residents of less populated areas.[407] Dun & Bradstreet states that functions need not be available in 100 percent of the BOC offices in a region before the functions can be deployed, but that the current gaps in services to be offered in September 1989 could have a major adverse impact on ESP marketing.[408] ICA states that it will be almost impossible for its members and the ESPs from whom those members buy service to provide comprehensive coverage and quality service if BSEs are offered on an end office basis only.[409]

202. In contrast, Ameritech states that while there is value to uniform deployment, it should not be decreed by regulation. It states that its deployment schedule properly reflects perceived demand by ESPs, economic feasibility of offering a certain function, and the network technology that will exist in its network as of September 1989.[410] Other parties state that the services the BOCs will make available should reflect the BOCs' unique technological capabilities and customer demands.[411]

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405 ANPA Comments at 16; ATSI Comments at 39; DEC Comments at 15; Dun & Bradstreet Comments at 35; IBM Comments at 13; ICA Comments at 9; TCA Comments at 16, n. 29; US Sprint Reply at 4.

406 ANPA Comments at 16.

407 ATSI Comments at 39. ATSI suggests that we condition plan approval on the submission of more uniform deployment schedules, require annual deployment updates, and direct the BOCs to make ONA services universally available within a reasonable time after plan approval. Id. at 41-42.

408 Dun & Bradstreet Comments at 35.

409 ICA Comments at 9.

410 Ameritech Reply at 30.

411 Bell Atlantic Reply at 14; BellSouth Reply at 10; Minnesota Comments at 6; New England Comments at 9.

2. Discussion

203. We recognize that an ESP may encounter problems in designing and marketing its offerings when a BOC fails to provide an ONA service provided by other BOCs, deploys the service at a later date than other BOCs, or offers the service in a manner that is technically incompatible with other BOCs. However, while we are committed to the principle of wide-scale uniformity of ONA services, it is neither realistic nor desirable, given existing differences in technology and market conditions among the BOCs, to mandate absolute uniformity. Rather, we require certain short-term and long-term initiatives that, together with marketplace forces, should lead to increased uniformity of ONA services.

204. Our examination of the plans and the industry's activities following the filing of the plans leads us to conclude that the BOCs should make a further showing that the BOCs are working with each other and with ESPs to ensure that uniformity among ONA services offered in different BOC regions is adequate to meet the needs of nationwide or multi-regional ESPs. While there is strong record evidence that uniformity problems are not as widespread as some commenters argue, the plans in their present form do not provide a coherent process by which the BOCs address uniformity concerns.

205. Some industry activities since the plans were filed can serve as models for such a process. For example, Bell Atlantic notes in its reply that it examined the other BOC plans after the plans were filed and found that it could offer 18 ONA services in addition to the initial set discussed in its plan. According to Bell Atlantic, it found that other BOCs responded to ESP requests for some ONA services in ways that, while different from Bell Atlantic's initial response are, nevertheless, feasible for Bell Atlantic as well. Bell Atlantic's activity indicates, among other things, that different ESPs may express a common need that the BOCs can satisfy in different ways, each of which may be appropriate for some ESPs. It also shows that increased uniformity among the BOCs' ONA services may be possible in the short term by a more systematic application of Bell Atlantic's comparative approach, since, to the extent each BOC expands its ONA offerings to include services proposed by other BOCs, uniformity increases. Accordingly, we require each BOC other than Bell Atlantic to examine the other BOCs' plans and amend its plan by May 19, 1989, to describe additional ONA services that it can offer based on this examination.

206. We also request the IILC to continue its cross-referencing efforts in this area. Similar to nomenclature cross-referencing, such efforts inform ESPs about how to provide enhanced services across BOC boundaries without actually changing the underlying different technical capabilities. One cross-referencing effort is the Reference Document, described above. Besides addressing nomenclature, the Reference Document describes each ONA service that is available and the varying technical responses by each BOC for that service, thereby highlighting existing differences. Likewise, AT&T's Transport Study analyzes the 29 network capabilities that the BOCs offer in

all seven regions and indicates for each network capability whether any technical or administrative change is required to accommodate interLATA transport. Both documents clarify gaps in ONA services that must be addressed by nationwide ESPs, therefore making it easier to address such gaps and provide services on a nationwide basis. As noted above, the IILC is exploring the use of a computer database system to provide increased accessibility to, and ongoing updating of, the cross-referencing data.

207. While the near-term activities required above may increase uniformity to some extent, a more organized, longer-term process for ensuring uniformity is also necessary. The BOCs, the ESPs, and others have also been addressing long-term uniformity issues through the IILC. For instance, the Technical Working Committee of IILC recently concluded a study describing five different methods of delivering Calling Number Identification. This committee reached consensus that a short-term remedy was available (trunk-side delivery via Feature Group D), and a preferred solution (line-side delivery based upon a ISDN-type interface) will become available as ISDN is implemented. While this is a promising example of a voluntary industry process addressing a technical uniformity issue, we believe that the BOCs and the ESP industry can make further progress.[412] Thus, we direct the BOCs to work through the IILC on uniformity issues and to amend their plans by May 19, 1989, to describe their efforts in this regard as well as to demonstrate how they will address in a systematic fashion uniformity issues involving specific ONA services of particular interest to the ESP industry.[413]

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412 We also expect the BOCs to demonstrate their commitment to meeting the need for technical uniformity by means other than simply relying on the status quo. A conclusion that Feature Group D, a trunk-side access arrangement, meets ESP needs for a uniform way of obtaining Calling Number Identification does not, for example, demonstrate a BOC commitment to expedite development of a uniform way of providing this ONA service through the line side of the switch.

413 There are a number of acceptable ways of addressing such issues through the IILC. A working group or subcommittee of the IILC could, for example, consider technical uniformity issues for additional ONA services as it did for Calling Number Identification. The IILC could also develop a list of specific services to examine based on the needs of ESPs as expressed in the IILC and the record in this proceeding, and determine proper delivery methods for those services. It could also determine how different technical implementations of ONA services could be made compatible in the near term and at later dates. Moreover, the IILC could determine the partially offered or partially deployed services for which uniformity is most important, and reach consensus on which of these services can and should be uniformly offered and deployed. In doing so, it should take into account the fact that nationwide availability and technical uniformity are likely to be more important for some types of ONA services then for others and easier to achieve for some

208. We do not believe it advisable, as a number of parties suggest, to delay the ONA process pending identification of a single, permissible technical application for each BSE. We require the BOCs to perform a comparative analysis of ONA services offered by other BOCs to determine what additional ONA services each BOC could offer. We also require the BOCs to participate in certain long-term IILC uniformity initiatives. Beyond these requirements, we recognize that ESPs themselves require different "optimal" methods of delivering specific BSEs depending on the needs of their own industry. Rather than imposing by regulatory fiat a single method of delivering a BSE, we believe that appropriate delivery methods should be determined by market demand and inter-industry efforts, including those of both the IILC and standards groups. We are also concerned that mandatory technical uniformity that is not market-driven could stifle choice, flexibility, and innovation. We reject any course that would limit appropriate means of delivery to the lowest common denominator available to all the BOCs, thereby retarding beneficial technological growth and advancement. Finally, we recognize that there may be short-term technical reasons for different technical applications of BSEs. For example, a carrier that has deployed a certain technology, such as CCS7,[414] may have the ability to deliver a certain BSE in a manner not open to a carrier that has not yet deployed the technology.[415]

209. We do not mandate a specific set of ONA services that the BOCs must offer at a certain time. In Section V, we evaluate the BOC's initial sets of ONA services and conclude that these services are adequate in scope and uniformity, given the different technological capabilities and customer demands of the BOCs. These same differences in market demand and embedded technology among BOCs present compelling reasons not to require all BOCs to offer precisely the same services on precisely the same schedule. Moreover, ESPs themselves differ over which ONA services should be uniformly provided. In declining to mandate such uniformity, we also note that some commenters overstate the prevalence of inconsistent technical applications and

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services than for others. Finally, the IILC could formulate appropriate procedures and timetables for BOC responses to ESPs' requests that they provide certain ONA services.

414 See supra n. 14.

415 We reject US Sprint's suggestion that we investigate the BSAs and BSEs offered by the BOCs to determine whether capabilities offered by two or more BOCs should be offered by other BOCs. US Sprint Comments at 6. We believe that these issues are best considered by the IILC in the first instance. As noted below, we will review IILC progress, and we retain the right to require BOCs to offer specific capabilities in the future.

transportability problems. With the exception of Hatfield's citation of "a few instances of technical inconsistency," no party supplied any hard evidence regarding the extent or effects of differing technical characteristics. In fact, AT&T's Transport Study, noted above, indicates that interLATA transport of the 29 ONA services being provided by all BOCs will not present serious technical/ administrative problems, at least for the NCs studied, although in later ex parte filings, AT&T indicates that this issue may arise for other ONA services.[416] Also, as we conclude at para. 125, the ONA plans introduce useful network functions and capabilities that are an improvement upon the status quo. Finally, efforts through the IILC and other groups will continue to clarify and simplify the task of constructing nationwide enhanced services offerings, even with differing technical applications.[417]

210. The achievement of uniform ONA services is a complex and difficult task. While the BOCs must demonstrate their processes for, and commitment to, addressing the issue, some differences in ONA services among the BOC regions may well be justified and desirable. Accordingly, there are compelling reasons for us to require that current initiatives towards technical uniformity proceed apace, without conditioning approval of the plans on the achievement of complete technical uniformity.[418]

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416 Ex Parte Letter from AT&T to H. Walker Feaster III, filed September 19, 1988.

417 The Phase II Order concluded that we should not apply Computer III requirements to the independent telphone companies (ITCs), because those companies do not have the same potential as the BOCs to engage in anticompetitive conduct. However, we noted that we stood ready to revisit the question after implementation of ONA. See Phase II Order, 2 FCC Rcd at 3099, para. 188. While we do not currently revisit whether Computer III requirements should apply to ITCs, we believe that all parties (including ITCs) stand to gain from uniformity initiatives among BOCs and ITCs in the provision of basic services for use by the enhanced service industry. ITC services will be more useful to ESPs to the extent the services are more uniform with BOC offerings because it will be easier for ESPs to incoporate uniform services into their nationwide service plans, which, in turn, should increase demand for services offered by ITCs. We also note that some ITCs already participate in the IILC. Accordingly, it would be valuable for the IILC to address questions relating to uniformity between BOC and ITC offerings of ONA services, as well as uniformity among BOC offerings. We encourage the ITCs to continue to participate in the IILC.

418 Several parties also argue for uniform ordering and provisioning procedures. CONAP Comments at 32; Dun & Bradstreet Comments at 34; US Sprint Comments at 4. We believe that cross-referencing efforts cataloging the BOC's ordering procedures will facilitate ordering of ONA services, even given differences in procedures among the BOCs. We believe this is an issue

D. Tariff Formats and Rate Structures

1. Positions of the Parties

211. The ONA plans use different tariff formats, pricing structures, and rates. Commenters urge uniform tariff formats,[419] while others urge uniform pricing structures and rates.[420] Bell Atlantic states that it will provide a detailed tariff guide to ONA services for its seven jurisdictions.[421] Some of the states argue that a uniform pricing requirement should not come at the cost of what they feel would be illegitimate preemption of state pricing prerogatives.[422]

2. Discussion

212. Uniform federal tariff formats are necessary to allow easy comparison and understanding of tariffs across BOC boundaries. The federal access tariffs have uniform formats and nomenclature that have been useful for purposes of comparing and evaluating tariffs. As discussed in Section IX C, infra, we will use the access tariff framework for federal tariffing of ONA services, which should provide substantial uniformity in this area.

213. We recognize that some degree of uniformity in structure and nomenclature among state tariffs, or between state and federal tariffs, may also be desirable and achievable. For example, the format and structure of the federal access tariffs, which were initially developed by the industry and refined in the various access tariff proceedings, have been adopted in many states for local exchange access services provided for intrastate, interexchange calling. A similar type of uniformity may be possible with ONA services. However, as distinguished from interexchange access services, the category "ONA services" includes a wide range of basic services and functions, many of which are used for a variety of purposes in addition to enhanced services. Therefore, achieving a similar degree of uniformity may be

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properly handled by the industry, using a forum like the IILC, and understand that it has already been raised in that body.

419 Ameritech States Comments at 6; ICA Reply at 9; New Jersey Comments at 3; NTIA Reply at 13; US Sprint Reply at 4.

420 CompuServe Comments at 29; DEC Comments at 14; Dun & Bradstreet Comments at 34; Ameritech States Comments at 6; Videotex Reply at 5.

421 Bell Atlantic Reply at 13.

422 Virginia Reply at 1; Missouri Reply at 4; New England Comments at 7.

more problematic and, at a minimum, could require a large measure of state/federal cooperation. We believe the states have an important role to play in this area, and in Section VIII, we establish a joint state/federal Conference, pursuant to Section 410(b) of the Act, to address such issues.

VIII. FEDERAL/STATE COOPERATION ON ONA MATTERS

A. Positions of the Parties

214. Parties recommend various methods for cooperation between the states and this Commission on a number of different ONA matters. For example, California and Missouri offer to participate in informal discussions with us on general ONA matters.[423] NTIA urges state/federal cooperation on tariff standardization through joint participation in an inter-industry committee.[424] CONAP and Ameritech States advocate the establishment of a NARUC Task Force, with participation by states, this Commission, BOCs, ESPs and users, to formulate model ONA tariffs.[425] Noam and New York advocate a two-tier forum structure, including an inter-governmental forum of the FCC and states to determine policy, and a private-sector forum for technical matters.[426] New Jersey advocates joint efforts of this Commission and states to develop a set of standard BSEs with common technical characteristics.[427] Arizona and Minnesota favor an arbitrator to resolve disputes between BOCs and competitors on the availability and pricing of ONA services and the use of proprietary information. They suggest a neutral industry group as the arbitrator, but favor allowing parties to appeal from the arbitrator to state and federal regulatory authorities, and suggest that state/federal coordination regarding the arbitration appeals process may be appropriate.[428] A recent NARUC resolution advocates the establishment of a conference between federal and state regulators pursuant to Section 410(b) of the Act.[429]

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423 California Reply at 3; Missouri Reply at 4.

424 NTIA Reply at 12.

425 CONAP Reply at 18-19; Ameritech States Comments at 8-9.

426 Noam Comments at 15; New York Reply at 2-3.

427 New Jersey Reply at 2.

428 Arizona Comments at 7-8; Minnesota Comments at 6.

429 See National Association of Regulatory Commissioners, Resolution Regarding Open Network Architecture, Resolution No. 2, San Francisco, CA (adopted Oct. 31, 1988).

215. In addition, a number of parties suggest that we convene a Joint Board. Illinois, Western Union, and Videotex advocate a Joint Board to address tariffing issues,[430] while Ameritech States and the District of Columbia advocate a Joint Board to promote greater uniformity.[431] An equal number of parties, however, specifically oppose convening a Joint Board. New York and Noam state that a Joint Board is unacceptable because it implies FCC imposition of solutions on the states.[432] Bell Atlantic states that a Joint Board is too formalistic and confining and could delay ONA implementation.[433] SWBT also opposes a Joint Board because it is concerned it will delay ONA implementation,[434] while US West believes that ONA issues are not sufficiently ripe to warrant the formal convening of a Joint Board.[435]

B. Discussion

216. We agree with the commenters that state/federal cooperation on ONA matters is advisable and believe that such cooperation can further the successful nationwide implementation of ONA in a variety of ways. To date, we have had a variety of state input on ONA matters including comments filed by twenty-eight states in this ONA proceeding, informal conversations and meetings with state representatives, and state and federal staff attendance and participation at NARUC meetings. We believe these interactions have resulted in beneficial exchanges of information and have increased awareness of ONA concerns at the state and federal levels. We believe that state/federal cooperation on ONA matters should be encouraged and formalized in a flexible forum recognizing different, legitimate state/federal spheres of authority on ONA matters, and based on the principle that coordination and cooperation among the states, and between this Commission and the states, when appropriate, can encourage the successful development and implementation of ONA.

217. We have decided to establish a state/federal ONA Conference (the Conference) pursuant to Section 410(b) of the Communications Act for these purposes. Section 410(b) provides that:

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430 Illinois Reply at 2-3; Western Union Comments at 3; Videotex Reply at 5.

431 Ameritech States Reply at 6; District of Columbia Comments at 14.

432 New York Reply at 4; Noam Comments at 15.

433 Bell Atlantic Reply at 25.

434 SWBT Reply at 12.

435 US West Reply at 65.

> The Commission may confer with any State Commission . . . regarding the relationship between rate structures, accounts, charges, practices, classifications, and regulations of carriers subject to the jurisdiction of such State commission and of the Commission.[436]

We believe that the implementation of ONA fits very well within this statutory language.

218. Procedures for Section 410(b) joint conferences are very flexible. Our rules state that:

> The Federal Commission, in accordance with the indicated procedure, will confer with any State commission regarding any matter relating to the regulation of public utilities subject to the jurisdiction of either commission. The commission desiring a conference upon any such matter should notify the other without delay, and thereupon the Federal Commission will promptly arrange for a conference in which all interested State Commissioners will be invited to be present.[437]

219. The Conference will be chaired by the Chairman of this Commission or his designee. It will include one other FCC Commissioner and representatives of seven state commissions, one from each BOC region, whom we will invite after consultation with NARUC. Our invitation of one representative from each BOC region should provide a varied perspective among Conference members and facilitate consideration of the different ONA plans filed in different regions.[438] Meetings will be called by the Conference Chairman, who may establish a regular schedule for meetings after consultations with Conference members. While we do not require this, the Conference may wish to consider holding meetings in each of the BOC regions, which would provide an opportunity for additional state commissioners and interested local parties to participate. The Conference should continue in

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436 47 U.S.C. § 410(b).

437 47 C.F.R. § 1, App. A.

438 The Conference is free to invite BOCs, ESPs, users, and other government representatives to participate in its discussions and/or make presentations. These parties will not, however, be actual members of the Conference.

existence until June 30, 1990, at which point it may decide to include any of its findings and recommendations in a written report to us.[439]

220. We anticipate that the Conference will serve as a forum for the exchange of information on the following specific issues: 1) ONA development issues of common interest, including the deployment of new network technologies, the delivery of new services to the public, nondiscrimination and efficiency in ONA services, and the relationship of ONA implementation to state and national economic development and competitiveness; 2) the propriety of, and possibly the development of, model ONA tariffs, with uniform nomenclature, format, and terms and conditions;[440] and 3) coordination of state and federal efforts in such areas as BOC technical and marketing trials for enhanced services and the effects of one jurisdiction's rules and policies on those of the other.[441]

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439 It is quite possible that at the conclusion of this Conference we will wish to convene another conference or create some other mechanism for federal/state cooperation. We think it preferable, however, especially in light of the untested nature of this approach, to establish a "sunset" date, rather than provide for a conference of indefinite duration. This should also provide a temporal focus for the Conference in organizing its efforts. At the close of the Conference, we and the states can assess the experience and determine the best course for the future.

440 For example, the National Regulatory Research Institute (NRRI) has issued a report prepared at NARUC's request that examines the feasibility a model ONA tariff for the states. See M. Kahn and R. Galligan, An Analysis of the Open Network Architecture (ONA) Costing and Tariff Plans filed by the Regional Bell Holding Companies, NRRI 88-15 (October 1988).The Conference conceivably could use these materials to develop or refine such a model tariff that it could then recommend to NARUC.

441 For example, while this order mandates a variety of ONA rules and requirements, we recognize that some of the states have opened state ONA proceedings and believe that the Conference should serve as a vehicle to foster cooperative efforts to encourage compatibility between state/federal rules and regulations, when appropriate.

221. We believe that a joint conference is a superior vehicle for federal/state cooperation to other forums suggested by the commenters. A joint conference is specifically authorized by the Communications Act, unlike any proposal except for a Joint Board. Moreover, unlike a Joint Board, which has a federal policy focus and by statute is required to formulate and address a Recommended Decision to this Commission, the Conference may take a broader perspective and is not required to produce such a Decision. Thus, a Joint Conference may provide a more flexible forum to promote an exchange of facts and information between and among the various states and federal jurisdictions, and has no specific limitations placed on it with respect to the nature of its output. This additional flexibility is particularly appropriate on ONA matters which, by their nature, will move forward both at the state and federal level.[442]

222. The Conference should satisfy many of the concerns of commenters urging state/federal cooperation. The Conference will facilitate the discussions suggested by California and Missouri, as well as providing a structure for that dialogue. Conference consideration of tariffing issues, along with IILC consideration of other ONA issues, is also generally in accord with the two-tier forum structure advocated by Noam and New York. Likewise, the Conference is responsive to CONAP's call for a task force to consider model ONA tariffs, and to NTIA's suggestion for state/federal cooperation on matters like uniform tariffs. We believe that New Jersey's concern regarding common technical characteristics for BSEs, which is primarily technical in nature, is best addressed in the inter-industry IILC, with its particular technical expertise.[443] We also disagree with NTIA's suggestion that tariffing matters be referred to an inter-industry committee such as the IILC. We believe that the IILC has a full set of issues to consider even without tariffing issues, and will not overburden that forum. Finally, although we do not adopt Arizona's and Minnesota's proposal to designate an inter-industy forum to arbitrate ONA disputes, we note that the Conference would be available to provide a forum for the exchange of information on state and federal ONA actions in resolving ONA disputes, as these parties suggest.

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442 A further advantage of a joint conference is that the progress of ONA efforts, both at the federal and state level, need not be indefinitely delayed pending formulation of a Recommended Decision and subsequent Commission action based on the Recommended Decision. Rather, this Commission and states will have the flexibility to act upon information that comes out of the Conference, as and when they deem appropriate.

443 We note, however, that all IILC meetings are open to the public, and New Jersey, as well as all other states, would be able to attend any and all IILC meetings that are of interest to it.

223. In conclusion, the Conference will provide a structure for a state/federal dialogue that may greatly facilitate the implementation of ONA on a nationwide basis by minimizing the confusion and potential inconsistency between federal and state policy. It will also provide a vehicle for state/federal cooperation to facilitate the full measure of economic development that will be possible under ONA, and that is necessary for the development of the first-rate information services industry that is crucial to the country's economic vitality in the emerging Information Age.

IX. JURISDICTION, TARIFFING, AND PRICING

A. Introduction

224. The Phase I Order noted that, while enhanced services are unregulated, the unbundled BOC ONA services are basic services and are subject to regulation as such on both the state and federal levels.[444] Reflecting the fact that both this Commission and the states have interests in regulating the basic services that constitute ONA offerings, the BOCs propose a variety of tariffing schemes and pricing methodologies for ONA services.

225. In this section, we analyze the jurisdictional, tariffing, and pricing issues raised by the BOC proposals. We conclude we have jurisdiction over all basic services included in the ONA plans that are used for interstate communications. We adopt, however, a measured approach that reflects, we believe, an appropriate jurisdictional balance in the tariffing of basic services.

226. We conclude that ONA services should be available in interstate tariffs for customers who wish to purchase those services. In most cases the proposed BSAs are very similar or identical to the access arrangements currently available through interstate tariffs. Accordingly, we treat these access arrangements as BSAs for federal tariffing purposes and require the BOCs to offer all of their BSEs that are technically compatible with such access arrangements in the federal access tariffs. We do not, however, require the federal tariffing of CNSs, which are now locally tariffed features provided on end user lines. We will initiate, in the near future, a rulemaking for the purpose of modifying our access tariff rules to accommodate federal tariffing of unbundled ONA services. While Ameritech's proposal is the most consistent with this approach to federal tariffing, none of the BOCs' plans as filed, including Ameritech's, fully satisfies these requirements.

227. With respect to the tariffing of intrastate ONA services, we do not find that any of the BOC proposals are so contrary to our ONA

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444 Phase I Order, 104 FCC 2d at 1039. This Commission preemptively deregulated enhanced services in the Computer II proceedings. Final Decision, 77 FCC 2d at 428-29; Computer II Further Reconsideration Order, 88 FCC 2d at 541 n.34. In the Computer III proceeding, we preempted the states from applying to the enhanced service operations of AT&T and the BOCs any structural separation requirements and any nonstructural safeguards inconsistent with those we imposed. Phase I Order, 104 FCC 2d at 1128.

objectives that they require disapproval. Nevertheless, we find that the Ameritech and NYNEX plans sufficiently explicate their overall tariffing structures to permit us to give final approval to this aspect of their plans. Each BOC other than NYNEX and Ameritech must amend its plan by May 19, 1989, to clarify its state tariffing proposal. We urge these BOCs to consider the Ameritech and NYNEX models in revising their state tariffing approaches. We are also requiring BOCs to provide certain additional information on particular aspects of their tariffing proposals. Finally, we conclude that we cannot approve an ONA plan, such as the BellSouth plan, that restricts ESPs from continuing to receive their currently available basic services.

B. The BOC Plans

228. Ameritech proposes to file its BSAs and BSEs as changes and additions to existing interstate and intrastate access tariffs.[445] Ameritech states that it will use an unbundled rate structure that will be consistent with that used in its current federal access tariffs and will apply this structure to both federal and state jurisdictions.[446] Its BSAs would be similar to interstate access services except that some of the features now included in the various feature groups would be unbundled and offered as optional BSEs. It plans to request a waiver of the Part 69 rules to permit it to unbundle the access rate elements for this purpose.[447] Ameritech proposes to include in state exchange tariffs both CNSs, which include some basic services on end user lines that other carriers label BSEs, and "other" capabilities, which it claims do not fit into the common ONA model, such as private line conditioning.[448]

229. Ameritech would continue to make existing services available to ESPs, including ordinary business lines, although BSEs could not be purchased with such services.[449] Rather, to obtain a BSE, an ESP or other

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445 Ameritech Plan at 93.

446 Id. at 94.

447 Id. at 93, 127; ExParte Letter from James K. Smith, Ameritech,to H. Walker Feaster, FCC, dated July 14, 1988, Attachment at 19 (Ameritech July 14, 1988 Ex Parte). See also infra para. 268. Ameritech plans to charge interstate and intrastate access rates. If an ONA offering involves end-user charges, e.g., circuit-switched, line-side access, Ameritech proposes a credit to the ESP to offset those charges. Ameritech Plan at 96.

448 Ameritech Reply at 19-21; Ameritech Plan at 32, App. 8 at 2. Such "other" capabilities include services other BOCs describe as ANSs.

449 Ameritech Reply at 6.

customer would have to purchase a BSA. Ameritech proposes no use or customer restrictions on ONA services.[450]

230. Ameritech proposes to employ cost-based rates that will be developed in accordance with Part 61 and Part 69 principles for its BSAs and BSEs.[451] However, Ameritech would not reprice CNSs or its category of "other" network capabilities to ensure that these were cost-based.[452]

231. Bell Atlantic's tariffing plans are somewhat vague. It opposes dual tariffing of "local BSEs" even if such BSEs are part of an end-to-end interstate enhanced service.[453] It proposes to offer most of its ONA services only through state tariffs, although it states that "access services needed by interexchange carriers for interstate communications services will be filed at the federal level."[454]

232. Bell Atlantic's plan is silent about whether it will allow ESPs to continue to use all existing forms of access. It appears, however, that BSAs will not be limited to services tariffed specially for ESPs, but for the most part will consist of generally available, local tariffed offerings.[455] Bell Atlantic apparently does not propose to withdraw any current forms of access from ESPs. Bell Atlantic's plan is also silent on the question of use restrictions. Bell Atlantic's pleadings do not discuss the generic pricing methodology it will use to set rates for ONA elements. It appears that when existing state tariffed local business services are used for access links, rates will be based on density cell pricing.[456] Bell Atlantic also states that purchasers of switched access will pay local

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450 Ameritech Plan at 1; Ameritech Reply at 21.

451 Ameritech Plan at 8, 96.

452 Ameritech Reply at 35. See supra para. 228 for a discussion of "other" capabilities under the Ameritech approach.

453 Bell Atlantic Reply at 21-22.

454 Id. at 2-3.

455 Bell Atlantic Plan at 62 ("sample CEI tariffs are those already on file with state commissions"); id. at 85 ("existing tariff rates are consistent with the Commission's Basic Interconnection Charge pricing requirement").

456 Bell Atlantic Plan at 84. Under such pricing, the denser the population of basic service subscribers in a given geographical area, the lower the dial tone rate. Id. .

transport charges at a distance-sensitive rate per minutes of use (MOU).[457] Bell Atlantic's pleading does not say when such charges would apply.

233. BellSouth states that it will tariff ONA elements in the "appropriate" state or federal jurisdiction. When interstate rates are appropriate, BellSouth states that it will include ONA rate elements in its interstate access tariff.[458] It proposes to tariff capabilities associated with services presently tariffed at the state level in a special ESP section of its state General Subscriber Services Tariff. ESPs would be required to take BSAs and BSEs from the state ESP tariff. The sample state ESP tariff that accompanies BellSouth's plan notes that "[s]witched transport usage for interLATA switched traffic will be provided from the appropriate intrastate or interstate switched access tariff."[459]

234. BellSouth would restrict ESPs from taking their existing forms of access.[460] At present, ESPs can obtain switched access in BellSouth's territory by using predominantly flat-rated local business lines.[461] Under BellSouth's plan, an ESP would be required to take access under the special ESP tariff at rates that include usage-sensitive charges.[462] Pursuant to this approach, BellSouth would not make BSEs available with ordinary local exchange services, but only with BSAs purchased from its special ESP tariff.[463] BellSouth would also impose customer restrictions on its special tariff, limiting it to ESPs only.

235. BellSouth states that its pricing is based on several principles, including that (1) "cost causers" should pay for their use of the network and regulated ratepayers should not pay higher rates for basic services so that enhanced services may be offered; (2) price levels should be set to reflect the value of the network to ESPs; and (3) ONA rates should take into account cross-elastic effects with existing services.[464] BellSouth

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457 Id. at 84-85.

458 BellSouth Reply at 59.

459 BellSouth Plan, Attachment Q, § A32.3G.

460 Id., Attachment Q, § 32.2F.

461 BellSouth Reply at 64 n.72.

462 BellSouth would apply usage-sensitive charges for transport. BellSouth Plan, Attachment Q, § A32.8.3.

463 Id., Attachment Q, § A32.2E.

464 Id. at 68-69.

states that to the extent that commenters object to "strategic" pricing of state-tariffed ONA rates in this proceeding, the commenters are in the wrong forum.[465]

236. NYNEX intends to offer its ONA services using existing tariff structures and jurisdictional principles. Thus, it states, it will tariff BSAs and BSEs used for interstate purposes in the federal jurisdiction and BSAs and BSEs used for intrastate purposes in the state jurisdictions.[466] It states that if a service is tariffed in one jurisdiction and "there is demand for it in another", it will "increase the jurisdictional availability" of the service.[467] At least for some services, however, such as custom calling-type features, NYNEX asserts it would increase jurisdictional availability by cross-referencing state-tariffed features in federal tariffs.[468]

237. Existing services would continue to be available to ESPs under the NYNEX plan.[469] NYNEX does not require that a BSA be purchased in order to obtain a BSE, but rather would permit BSEs to be used with any existing access arrangements with which they are technically compatible.[470] NYNEX proposes no restrictions on ONA services based on customer identity or use.[471]

238. NYNEX would retain existing rate levels for existing services. However, for new services, it would include a component designed to recover the "business risk" of offering new services.[472] It states that it would decrease this "risk" component if an ESP guarantees a minimum level of demand through a firm monetary commitment for the service requested.[473] NYNEX also construes the cost of a service to include a factor of "price

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465 BellSouth Reply at 35-36.

466 NYNEX Plan at 96.

467 Id. at 97.

468 Id. at 97.

469 NYNEX Reply at 74.

470 Id.

471 Id at 52.

472 Id. at 35.

473 Id. at 35 n.53.

uniformity and stability".[474] NYNEX believes that prices should be set to stimulate market demand. Although it will conform to the pricing policies of the applicable jurisdiction, NYNEX favors the eventual elimination of uneconomic subsidies, and the even distribution of remaining subsidies over all ratepayers.[475]

239. Pactel does not clearly describe its tariffing plans. It apparently intends to file new ESP access tariffs, with wider calling areas and distance-sensitive banded pricing, at the state level.[476] Its plans for federal tariffing are undefined. It states that it will file BSE tariffs with the "appropriate regulatory body as soon as the demand [for such services] is validated."[477] It states that many ESP requests are for services that are either already provided in exchange tariffs or could be offered as future tariffed services in the exchange arena.[478] Because these existing services are priced to earn a contribution, Pactel states that it will file, presumably at the state level, a bulk purchase rate structure that includes third-party billing.[479] Pactel states that it is filing all BSEs in separate tariffs, but that since these services "will be available to all customers who can purchase the appropriate BSAs,"[480] there is no need for any waivers of our policy against use restrictions.

240. It appears that Pactel will continue to make existing services available to ESPs, although Pactel's plan is somewhat unclear on this point. Pactel's plan is also unclear on whether BSEs will be provided generally with such existing arrangements or whether an ESP will be required to purchase a BSA in order to purchase a BSE. Its proposal for a new ESP access tariff suggests that BSEs will be available only from such a tariff. On the other hand, Pactel states in its reply that BSEs will be linked to BSAs only where technically required, and lists those BSEs which do not require a BSA.[481]

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474 Id. at 31 n.44.

475 Id. at 35-36.

476 Pactel Plan at 21.

477 Id. at 22.

478 Id. at 22. See also Pactel Reply at 36.

479 Pactel Plan at 22.

480 Id. at 45.

481 Pactel Reply at 8-9 & Exhibit 1.

Pactel's pleadings are ambiguous as to whether its special bulk-billed BSEs require a BSA.[482]

241. Pactel states that ONA pricing should be calculated on a case-by-case basis. It advocates that prices should be set to: help stimulate the ESP marketplace; optimize the market impact of new service introductions on the end user; cover the costs of service or otherwise comply with regulatory requirements; minimize the risk of new investment by reflecting optimal serving arrangements, which may differ for ESPs and BOCs; and ensure, for the foreseeable future, that ONA does not disrupt the existing subsidy mechanism by introducing arbitrage options (although over time, Pactel asserts, the overall subsidy requirement should decrease).[483] Pactel observes that this Commission has sanctioned the use of market demand as a criterion in a carrier's decision about offering particular BSEs.[484] Pactel states that many requested BSEs are exchange services that are priced to generate a contribution to basic services. It claims that to facilitate ESP market development, it will file the bulk purchase rate structure, discussed above,[485] for some BSEs.

242. SWBT proposes to tariff interstate circuit-switched BSAs in the interstate switched access tariff, which, for corresponding BSEs, would cross-reference a new state Enhanced Service Interconnection (ESI) tariff.[486] SWBT plans to tariff intrastate circuit switched BSAs in the intrastate switched access tariff or in its ESI tariff.[487] SWBT plans to tariff dedicated (non-switched) BSAs and BSEs in state special access and private line tariffs and federal special access tariffs and packet-switched BSAs and BSEs in state and federal packet service tariffs.[488] It proposes "equivalent pricing" for its ESI services so that the prices of unbundled services, when

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482 Id. at Exhibit 1.

483 Pactel Plan at 15-16.

484 Pactel Reply at iv.

485 See supra para. 239.

486 SWBT Plan, Figure 3.

487 Id.

488 Id.

added together, are never less than the prices of the existing bundled services of which they are components.[489]

243. SWBT proposes to permit ESPs to continue to take their existing business line services and other forms of local exchange service.[490] However, SWBT would not make BSEs available with such services (although BSEs would be available with intrastate and interstate special access, interstate switched access, and packet switched access, which are BSAs under the SWBT Plan).[491] If an ESP wishes to purchase a BSE, it will have to take service from SWBT's special ESI tariff. ESPs taking service under this tariff will pay rates that include usage-sensitive charges.[492] SWBT states that it is opposed to use or customer restrictions in tariffs and will seek to avoid them, but that if its "equivalent pricing" proposal (described above) is not adopted, state commissions in its territory may find it necessary to employ such restrictions in its state ESI tariffs.[493]

244. SWBT states that for most state-tariffed BSAs/BSEs, it will include a "contribution" or an amount above directly assigned incremental costs, to cover common costs.[494] The amount of contribution, or markup over incremental cost, for a particular service will take into account market demand for the service, including the prices of similar or substitutable services.[495]

245. The US West plan appears to be similar to that of NYNEX. Although it does not use the term "BSA" in its plan, US West states that BSEs must be utilized with an access connection, which it will make available through existing tariffs.[496] It indicates that it will offer BSEs in the same jurisdiction as the access to such BSEs is offered. US West states that it will offer most services identified as BSEs pursuant to intrastate general and exchange tariffs. It proposes to reference, pursuant to a waiver of

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489 SWBT Plan at 93.

490 Id. at 92.

491 Id., Figure 3.

492 Id. at 102-04.

493 Id. at 94.

494 Id. at 91.

495 Id. at 94.

496 US West Plan at 27.

Section 61.74 of our rules,[497] such state tariffs in interstate access tariffs.[498] According to US West, it will tariff "non-exchange type" services offered as BSEs on an interstate basis in accordance with federal tariff rules "when interstate demand exists."[499]

246. According to US West, ESPs will be able to use all currently available access services and will be able to purchase BSEs with such services subject only to technical compatibility limitations, although it states that use of a business line with a BSE cannot be guaranteed in perpetuity.[500] US West proposes no customer or use restrictions on BSEs, but does state that BSEs are subject to restrictions on the use of underlying access arrangements; for example, strictly interstate BSEs will be available only to purchasers of interstate access.[501]

247. US West states that the pricing of intrastate BSEs will be consistent with Computer III policies, which dictate "that there must be a relationship between the price and cost of a Basic Service Element".[502] It states that it will base its pricing on the ratemaking methodologies of the applicable jurisdiction, using long-run incremental cost or fully distributed cost as required.[503] US West states that for access services priced according to distance, it will rate its collocated services in the lowest mileage band, which for switched access is up to one mile.[504] It states that this Commission's ONA pricing rules are based on a nondiscrimination standard, which it will meet because it will not discriminate between its own and competing ESP operations.[505]

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497 47 C.F.R. § 61.74.

498 US West Plan at 363-64, 367.

499 Id. at 363.

500 Id. at 20.

501 Id. at iv-v, 368.

502 Id. at 365-66, citing Phase I Order, 104 FCC 2d at 1064-66.

503 Id. at 366.

504 Id. at 354 & n. 198.

505 Id. at 366-67, citing Phase I Reconsideration, 2 FCC Rcd at 3054.

C. Jurisdictional Questions

1. Positions of the Parties

a. Legal Issues

248. Many commenters contend that we have well-settled authority to assert jurisdiction over all facilities and services used in interstate communications.[506] They note, citing numerous judicial decisions, including Southwestern Cable and NARUC,[507] that it is not the physical location, but the nature of the communication that determines jurisdiction, and that, accordingly, we have jurisdiction over the interstate use of all communications services.[508] Dun & Bradstreet states that under the Act, carriers are not free to determine the jurisdiction in which a service is tariffed.[509]

249. Tymnet contends that we have jurisdiction over each element of an interstate service, including the local loop used to originate or terminate the communication. Under this reasoning, according to Tymnet, our assertion of jurisdiction over such an interstate service cannot be considered to be preemption.[510] Both Tymnet and Dun & Bradstreet cite the access charge decision in MTS and WATS Market Structure, which established rules governing the rates charged for the use of local exchange facilities in interstate calling, in support of a broad Commission assertion of jurisdiction.[511]

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506 See, e.g., ADAPSO Comments at 46-49; ADT Comments at 10-13; Joint Parties Comments at 4; CONAP Comments at 68-71. See also ALC Comments at 7; US Sprint Reply at 9-10; NTIA Comments at 26.

507 United States v. Southwestern Cable, 392 U.S. 157, 167-69 (1968) (Southwestern Cable); NARUC v. FCC, 746 F.2d 1492, 1498-1501 (D.C. Cir. 1984) (NARUC), cited, e.g., in ADAPSO Comments at 46-49.

508 See, e.g., ATSI Comments at 29; Telenet Comments at 35-36; Telenet Reply at 7; Tymnet Comments at 32-36; MCI Reply at 33.

509 Dun & Bradstreet Comments at 37.

510 Tymnet Comments at 34-35. Tymnet, however, adds that some of the plans depart so radically from ONA principles that preemption may be necessary. Id. at 36.

511 Tymnet Comments at 33-36, Dun & Bradstreet Comments at 37 n. 69, citing MTS & WATS Market Structure, 93 FCC 2d 241, on reconsideration, 97 FCC 2d 682 (1983), on further reconsideration, 97 FCC 2d 834 (1984), aff'd in pertinent part and remanded in part sub nom. NARUC v. FCC, 737 F. 2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985).

250. Many parties believe that this Commission has jurisdiction over ONA services because most or many enhanced services are interstate in nature, at least for a portion of their traffic.[512] ALC, citing our imposition of subscriber line charges on end users, objects to SWBT's characterization of CNSs as intrastate merely because these offerings require local exchange service.[513] CONAP believes that if use of an ONA service can be measured adequately for jurisdictional purposes, interstate or intrastate charges should apply, depending on the nature of the use. If adequate measurement is impossible, then the percentage of interstate use should be estimated and that portion of the usage should be subjected to our interstate jurisdiction. If use of the ONA service cannot be measured, CONAP argues that the "contamination doctrine" applies if the service is used at all for interstate communication.[514] Dun & Bradstreet claims that to the extent that an ONA service has the potential for use for interstate communications, it must be federally tariffed.[515]

251. Some parties argue that our previous Computer III decisions also require tariffing in the appropriate jurisdiction, including federal tariffing.[516] The vast majority of these parties appear to support a "dual" tariffing approach.[517] CBEMA argues that, contrary to the position of some BOCs, our decision in Computer III to permit state regulation of ONA rates does not support exclusive or near-exclusive use of state tariffs, which it

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512 ADT Comments at 12-13; Telenet Comments at 36 & n.29; NTIA Comments at 26.

513 ALC Comments at 10-11, citing NARUC v. FCC, supra note 511, 737 F.2d at 1113. Cf. CONAP Comments at 70 (noting that even residential users pay interstate access fees, through the subscriber line charge, and through MTS rates that recover switched access charges).

514 CONAP Comments at 70-71. Both CONAP and Dun & Bradstreet state that even if a functionality is used "primarily" for intrastate purposes, this Commission retains jurisdiction. CONAP Reply at 5-6; Dun & Bradstreet Comments at 38.

515 Id. at 38.

516 See, e.g., ADT Comments at 10-11; ATSI Comments at 29-30; Telenet Comments at 32; Tymnet Comments at 32; Telocator Comments at 4.

517 See, e.g., Telenet Comments at 32-35; Tymnet Comments at 32; Telocator Comments at 2.

characterizes as state preemption of federal regulation.[518] Dun & Bradstreet states that while this Commission generally does not have authority over intrastate rates, it has the power to withhold relief from the separate subsidiary requirement on the basis of the overall "environment," including the rates, that the BOCs have created for telecommunications services on which enhanced services depend.[519] Hello argues that we should approve each ONA service to be offered at the state level.[520]

252. Some states and MPC argue that a physically intrastate service that is currently tariffed at the state level is an intrastate service regardless of whether the traffic carried over it is interstate.[521] MPC also argues that the great majority of enhanced services that will use ONA services originate and terminate traffic within a given LATA.[522]

253. Many states contend that dual state/federal jurisdiction over services previously tariffed only at the state level would require us to preempt existing state regulations.[523] Most states assert that we cannot preempt state authority over intrastate services,[524] citing the Supreme Court's Louisiana decision.[525] NARUC, for example, argues that Louisiana

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518 CBEMA Comments at 31-32, opposing BellSouth Plan at 73-74, SWBT Plan at 85.

519 Dun & Bradstreet Comments at 29.

520 Hello Comments at 20.

521 See, e.g., Florida Comments at 2; Missouri Comments at 3-4; MPC Reply at 3-4. Cf. New Jersey Reply at 9-10 ("all existing and future intrastate BSEs and BSAs must be tariffed under state jurisdiction so as not to restrict the State Commission from exercising its appropriate authority"), Alabama Comments at 2 (urging that ONA rate elements be tariffed in the intrastate as opposed to to interstate jurisdiction); New England Comments at 3-4 (because most ONA elements will involve jurisdictionally intrastate plant, such services should be regulated at the state level.)

522 MPC Reply at 3.

523 Wisconsin takes the position that ONA plans cannot be implemented without the approval of state commissions. Wisconsin Comments at 6.

524 See, e.g., New England Comments at 5.

525 See, e.g., New England Comments at 5; Missouri Comments at 3-4, citing Louisiana Pub. Serv. Comm. v. FCC, 476 US 355 (1986). See also New York Reply at 6 n.1. Some states reiterate their objections to our preemption in Computer III of state imposed structural separation requirements and our

has narrowly limited the applicability of cases such as NCUC II to situations in which it is impossible to separate the interstate from intrastate components of the services or facilities.[526] NARUC believes that this inseparability argument is inapplicable to enhanced services, and that NCUC II is therefore inapposite.[527] Parties also argue that our Computer III decisions recognize the role of the states in implementing ONA.[528]

254. Bell Atlantic argues that this Commission has no jurisdiction over the intrastate basic services used in connection with interstate enhanced services, reasoning that we have jurisdiction only over those local services used for and in connection with "interstate communication." Bell Atlantic asserts that we have defined enhanced services to be "non-communications" services. Hence, according to Bell Atlantic, this Commission has no jurisdiction over such services pursuant to Section 2(b) and Sections 201-205 of the Act,[529] even if those services are interstate in nature.[530]

255. Pactel and NARUC argue that ONA should not alter the relative scope of federal and state jurisdiction.[531] Pactel states that as a practical matter, this will probably result in most ONA offerings falling under state jurisdiction.[532] NARUC, recognizingthat ONA services have both interstate and

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preemption in Computer II of the regulation of enhanced services. See, e.g., Wisconsin Comments at 2; Ameritech States Comments at 11; New England Comments at 3 n.2.

526 NARUC Reply at 3-6, citing North Carolina Utilities Comm. v. FCC, 552 F.2d 1036 (4th Cir. 1977), cert. denied, 434 U.S. 874 (1977) (NCUC II) and responding to Tyment Comments at 36.

527 NARUC Reply at 3-6.

528 See, e.g., Missouri Reply at 3, citing Phase I Reconsideration, 2 FCC Rcd at 3054, para. 133; NARUC Reply at 7-8, citing Phase I Reconsideration, 2 FCC Rcd at 3051, para. 111, at 3054, para. 134; California Reply at 1-3; Alabama Comments at 2-3.

529 47 U.S.C. §§ 152(b), 201-205.

530 Bell Atlantic Reply at 2-3, 21-22. Bell Atlantic also states it will offer most ONA services under local exchange tariffs because ESPs are not subject to interstate access charges. Bell Atlantic Plan, Introduction at 4.

531 Pactel Plan at 5; NARUC Reply, App. at 12.

532 Pactel Plan at 5-6. US West apparently goes even further and argues that even when this Commission indisputably has jurisdiction, significant questions exist as to the scope of our authority. For example, US

intrastate applications, also supports the use of "dual tariffing", but does not specify the form that this would take.[533]

256. Some states claim that jurisdiction for tariffing purposes must follow the assignment of the costs of regulated investment, so that BSEs that are provided over intrastate plant should be tariffed with the states.[534] CONAP replies that just the opposite is true; jurisdiction determines cost allocations under the separations manual.[535] A number of parties also raise issues concerning the jurisdictional separations process and ONA services. The Ameritech States, while supporting Ameritech's dual jurisdictional approach, believe that we should update the separations rules for ONA services to ensure that the associated costs fall into the appropriate jurisdiction and are recovered through the appropriate access tariffs based on relative use.[536] ALC claims that SWBT's plan, by tariffing interstate BSEs at the state level and continuing to allocate BSE costs to the interstate jurisdiction, will result in cross-subsidization of intrastate ONA services by interstate IXCs and ESPs to the advantage of the BOC's enhanced service operations, which will primarily use intrastate ONA services.[537] MPC urges Bell Atlantic and the other BOCs to elaborate on the manner in which

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West questions our power to require a BOC to offer a new service, at least in the absence of a full opportunity for hearing. US West Plan at 23. See also US West Reply at 10-12, 19-22. US West states that our jurisdiction over exchange facilities generally encompasses only interstate exchange access except when interstate services are so inextricably intertwined with exchange services that reasonable segregation of interstate and intrastate services or facilities is impossible. US West Plan at 24.

533 NARUC Reply at 3; see also Shooshan & Jackson Reply at 56.

534 See, e.g., New England Comments at 3-4, 6; Virginia Reply at 2. New England argues that the investment associated with most BSEs is primarily in local dial switching equipment. It says that such investment is currently allocated based on usage. It states that if a new service does not add more minutes of use to the jurisdiction in which it is tariffed then the other jurisdiction will be allocated the investment costs associated with the new service and will be subsidizing the service. It argues that BSE revenues should be considered intrastate whenever the separations manual assigns costs to the intrastate jurisdiction, in order to avoid a mismatch of revenues and costs. New England Comments at 6.

535 CONAP Reply at 6.

536 Ameritech States Comments at 13-14.

537 ALC Comments at 14-15 & n.31.

jurisdictional separations will operate and costs will be allocated among jurisdictions.[538]

b. Federal Tariffing of ONA Services

(i) General Approach

257. Many commenters contend that there are strong policy reasons for this Commission to assert jurisdiction over the pricing and tariffing of interstate ONA services.[539] They argue that most ESPs offer predominantly interstate services and carry predominantly interstate traffic[540] and that federal jurisdiction is essential to the realization of ONA objectives,[541] such as protection of unaffiliated ESPs against discrimination and other forms of anticompetitive activity.[542] Such commenters also argue that federal jurisdiction over ONA services is critical in light of the BOCs' plans to employ use restrictions and non-cost based factors in setting rates.[543] These commenters contend that federal jurisdiction is central to permitting ESPs, which may not have the resources to participate in state-by-state regulatory processes, to have an effective say in the ONA process,[544] and to avoid creating an "administrative nightmare" for those ESPs providing nationwide service.[545] Some commenters take an expansive view of the guidelines

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538 MPC Reply at 6.

539 Telenet Reply at 6-7; Joint Parties Comments at 4; NTIA Comments at 25-26.

540 See, e.g., Telenet Reply at 7; MCI Comments at 35; MCI Reply at 32-33. Cf. Ameritech Plan at 93 (ESP applications for ONA services exist on both an interstate and intrastate basis).

541 See, e.g., MCI Comments at 34-37; ADAPSO Comments at 46-50; Telenet Reply at 6-7; AICC Reply at 12-14; CBEMA Comments at 29, 31; DEC Comments at 13; CONAP Comments at 72; CONAP Reply at 6-7 TCA Comments at 8.

542 CBEMA Comments at 29, 31.

543 See, e.g., ALC Comments at 11; ANPA Comments at 25-26; ATSI Comments at 29-31; CBEMA Comments at 31; DEC Comments at 13-14. Cf. Telocator Reply at 3 (federal tariffs would prohibit the BOCs from engaging in unreasonable price discrimination, since federal tariffs have to be cost-based).

544 Telenet Comments at 25; CBEMA Comments at 31.

545 See, e.g., US Sprint Reply at 10.

that we should formulate. They argue, for example, that we have jurisdiction over ESPs with interstate operations, and that the federal policy interests that justified preemption of conflicting state structural separation requirements in Computer III supports such the broad application of our policies.[546] Parties also criticize some BOCs' plans to detariff certain services at the state level.[547]

258. ALC states that the entire telecommunications industry, "including the ESP industry," has operated under a shared jurisdictional regime for the past 50 years. According to ALC, if dual jurisdiction over ONA services is a problem, all mixed-use services should be filed in federal tariffs.[548] API objects to Bell Atlantic's proposal to offer most ONA services under local tariffs, claiming, inter alia, that this proposal further complicates jurisdictional tariffing, particularly for special access. Under Bell Atlantic's approach, API contends, parties may have to obtain BSEs for interstate special access from local tariffs.[549] In addressing concerns raised in the BOCs' plans that federal tariffing will create opportunities for tariff arbitrage, CONAP argues that, on the contrary, it is desirable to have "tariff shopping" if that means having informed consumers taking service under the proper interstate or intrastate tariff.[550]

259. NARUC, MPC, several BOCs, and some states claim that, as a policy matter, we should not assert jurisdiction over "intrastate" services. They assert that most ONA services are local in nature,[551] and that states are currently responsible for,[552] have superior expertise in,[553] and are

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546 ADT Comments at 14 n.37; IIA Comments at 18 n.30. Cf. Telocator Reply at 4 (ONA guidelines should require interstate tarifs, consistent ONA tariff formats, and rates that are based on costs rather than market considerations).

547 See, e.g., MCI Comments at 35-36; CONAP Comments at 73-74.

548 ALC Comments at 9-10, citing Alascom v. FCC, 727 F.2d 1212 (D.C. Cir. 1984); AT&T, 56 FCC 2d 14 at 19-20, paras. 17-19 (1975), aff'd sub nom. California v. FCC (1978), 567 F.2d 84 (D.C. Cir. 1977) (per curiam), cert. denied, 434 U.S. 1010

549 API Comments at 10-11.

550 CONAP Reply at 8-10.

551 See, e.g., Alabama Comments at 2; Florida Comments at 2; Missouri Reply at 3; New England Comments at 3; New Jersey Comments at 10; MPC Comments at 3; US West Plan at 363-64; BellSouth Reply at 63-64.

552 See, e.g., Alabama Comments at 2; MPC Comments at 3.

in a better position to determine cost, market demand, and demographic factors affecting those services[554] in light of the variations in such factors that occur on a state-by-state basis.[555] Some BOCs state that many ESP requests for service, such as call forwarding functions, fall into the local exchange service category and historically have been tariffed exclusively in the state jurisdiction.[556] BellSouth states that federal tariffing of BSEs would disrupt pricing arrangements for services that have traditionally been tariffed at the local level.[557] Some parties also argue that exclusive state tariffing would prevent tariff shopping,[558] further universal service goals,[559] permit accurate reporting of jurisdictional usage,[560] and eliminate confusion and duplication that dual tariffing would cause.[561] Some states argue that a dual-jurisdictional tariffing approach, like that of Ameritech, would encroach on states' legitimate obligations to ensure reasonableness of local rates and deployment decisions that affect intrastate investment.[562] BellSouth asserts that state tariffing will not permit evasion of federal ONA review, since all BOC plans must still meet this Commission's guidelines and secure approval in the ONA review process.[563]

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553 See, e.g., Virginia Comments at 2; MPC Reply at 3.

554 See, e.g., Florida Comments at 4; Alabama Comments at 2; NARUC Reply at 8; New England Comments at 3, 7-10.

555 See, e.g., New England Comments at 7; Virginia Reply at 2.

556 See, e.g., Pactel Reply at 36; BellSouth Reply at 63.

557 BellSouth Reply at 63-64.

558 See, e.g., Alabama Comments at 2-3; Arizona Comments at 4; New England Reply at 16; MPC Reply at 4; Bell Atlantic Reply at 22-23.

559 See, e.g., New England Reply at 16-17.

560 Alabama Comments at 3.

561 Arizona Comments at 4; Bell Atlantic Reply at 23. Cf. US West Plan at 365 (exercise of full scope of federal jurisdiction over local exchange type services would not bring about uniformity because local and interstate prices would differ). New York suggests that, for policy reasons, federal tariffs could mirror state tariffs. New York Reply at 10 n.1.

562 See, e.g., Wisconsin Comments at 2-4; New England Comments at 8; New Jersey Reply at 7; California Comments at 6.

563 BellSouth Reply at 60.

260. US West, while conceding that exchange facilities and services used in provision of interstate access are within our jurisdiction,[564] nevertheless states that we may lawfully permit a particular exchange service to remain completely within the intrastate jurisdiction and to be purchased from local exchange tariffs. It cites the Diamond International decision to support that conclusion.[565] BellSouth takes a similar position, citing Department of Defense v. Chesapeake and Potomac Telephone Company.[566] US West argues that parties supporting mandatory federal tariffing of BSEs really seek a federally-imposed rate structure so that these parties can pick and choose between federal and state tariffs to avoid both federal and state regulatory subsidies.[567]

261. Several states and some BOCs would limit this Commission's role in ONA to preventing anticompetitive or discriminatory effects against ESPs.[568] Alabama, for example, interprets Computer III as supporting state regulation so long as state regulation does not interfere with our procompetitive thrust.[569] Pactel states that we should establish broad

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564 US West Plan at 363 & n.213, citing Bell Tel. Pa. v. FCC, 503 F. 2d 1250 (3d Cir. 1974), cert. denied, 422 U.S. 1026 (1975); Lincoln Tel. & Tel. Co. v. FCC, 659 F. 2d 1092, 1107-9 (D. C. Cir. 1981).

565 US West Plan at 364 & n. 215, citing Diamond Intern. Corp. v. FCC, 627 F.2d 489, 492-94 (D.C. Cir. 1980).

566 BellSouth Reply at 62-63 n.69, citing Department of Defense v. Chesapeake and Potomac Telephone Co., 69 FCC 2d 393 (1978), recon., 71 FCC 2d 1336 (1977) further recon., 75 FCC 2d 45 (1979) (Department of Defense). Department of Defense was overruled in AT&T (1.544 Mbps), 103 FCC 2d 69, 76 (1985) to the extent that is permitted states to regulate the entire charge for a mixed-use facility. BellSouth replies to Telenet's citation of authorities including AT&T (1.544 Mbps) and AT&T (Hecht Co.), FCC 85-465, Mimeo No. 36097 (released Aug. 16, 1985), recon., FCC 87-169, 2 FCC Rcd 3528 (1987), for the proposition that interstate tariffs are required for interstate services. BellSouth notes that these two decisions have been vacated on other grounds as moot, citing AT&T (1544 Mpbs), 1 FCC Rcd 362 (1986); Chesapeake and Potomac Telephone Co. (Hecht), 3 FCC Rcd 748 (1988). See BellSouth Reply at 62-63 n.69. BellSouth argues that Department of Defense thus remains applicable law.

567 US West Reply at 74-75.

568 See, e.g., US West Plan at 25, 365. See also New England Reply at 2.

569 Alabama Comments at 2.

guidelines for ONA development while accepting that many of the tariffing and other implementation issues are best resolved at the state level.[570] MPC, while generally advocating a state tariffing approach, argues that this Commission should nevertheless address state tariffs that do not meet the ONA

costing or nondiscrimination criteria.[571] US West takes the position that the focus of our exercise of jurisdiction in ONA must be to ensure equality of access, not to reconfigure the local networks.[572] US West states that successful ONA implementation requires state-federal coordination and that its plan recognizes the dual regulatory jurisdiction over the telecommunications market.[573] According to US West, given the "precarious status" of this Commission's existing preemption decisions, further preemption might be unwise, especially given the absence of a meaningful record that permits analysis of valid state policies regarding local exchange competition.[574] US West states that it would be an error to reject an ONA plan because of a lawful state rule or regulation, and if an actual conflict arises in the future, a proper decision on preemption should be made at that time based on a full record, rather than based upon hypothetical conflicts.[575]

(ii) Use of Access Tariffs

262. Each BOC proposes at least some use of federal access tariffs for ONA services.[576] ICA argues generally that ONA services that are part of

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570 Pactel Plan at 11.

571 MPC Comments at 3. MPC also asserts that special problems exist when states are entertaining proposals for a rate freeze or discretionary pricing, or when a state has deregulated basic services. Id. at 4; MPC Reply at 5. BellSouth replies that we have anticipated the problem of deregulated state services, by requiring that a BOC file a description of the circumstances under which the carrier would offer untariffed BSEs. Bell South Reply at 62, citing Phase I Reconsideration, 2 FCC Rcd at 3054-55, para. 136.

572 US West Plan at 25. AICC takes issue with US West's view that FCC jurisdiction is limited to questions of equality. AICC states that by such reasoning, states would also be free to impose more stringent requirements than those imposed by this Commission, a circumstance which Computer III expressly prohibits. AICC-US West Comments at 4-7.

573 US West Plan at 25. See also US West Reply at 16-18.

574 Id.

575 Id. at 18.

576 BellSouth Plan at 70, 74; BellSouth Reply at 59; US West Plan at iv-

an interstate service configuration are analogous to interstate access elements for interexchange carriers and should be treated similarly.[577] TCA also uses the access charge analogy in urging us to require federal ONA tariffs.[578] AT&T supports Ameritech's proposal to offer ONA capabilities in interstate access tariffs. AT&T believes that we should require the BOCs to amend their plans to provide that BSAs and BSEs will be included in interstate access tariffs filed pursuant to Part 69 of our rules.[579]

263. Some BOCs explicitly propose to reference state tariffs for ONA services in their interstate access tariffs.[580] US West states that it will offer most BSEs pursuant to intrastate general exchange tariffs and will reference those tariffs in interstate access tariffs, in the same manner as it does for custom calling services today.[581] It suggests that a waiver of Section 61.74 of our rules[582] may be necessary for this purpose.[583] Although it states that it will tariff non-exchange-type services offered as BSEs at the federal level pursuant to our rules, it plans to tariff "exchange-type" BSEs only at the state level, even when these services are used for interstate purposes. US West argues that exercise of the full scope of federal jurisdiction in this area cannot bring about national uniformity and will result in different prices for the same service at the state and federal level.[584] US West states that because it will not discriminate between its

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v, 368; US West Reply at 71; SWBT Plan at 8, 82-83; NYNEX Plan at 96; Bell Atlantic Reply at 3; Ameritech Plan at 93. Cf. Pactel Reply at 36 (noting generally that under current state/federal practices, access services are dual tariffed, packet switching services are cross-referenced to state tariffs, and exchange services are tariffed by the states, and stating that most BSE functions fall into the last category).

577 ICA Reply at 3.

578 TCA Comments at 8.

579 AT&T Comments at 11-12, 17, 25.

580 See, e.g., NYNEX Plan at 97; US West Plan at 363, 367; SWBT Reply at 27-28.

581 US West Plan at 363, 367.

582 47 C.F.R. § 61.74. Section 61.74 prohibits, with specific exceptions, tariffs filed with this Commission from making reference to any other tariff publication or other documents or instruments.

583 US West Plan at 364-65.

584 Id. at 363-65.

own enhanced service operations and those of ESPs in pricing such elements, it need not obtain a waiver of our ONA pricing rules to cross-reference such services.[585] SWBT also requests a waiver of Section 61.74. However, SWBT proposes to cross-reference only circuit switched BSEs,[586] and states that all other ONA services will continue to be tariffed according to general principles currently in effect.[587]

264. NYNEX plans to cross-reference state tariffs for new ONA services in federal access tariffs but does not specify the extent to which it will do so and the specific services that it will reference. NYNEX suggests that one such ONA service could be "call forwarding on busy line and don't answer." It says the referencing of this ONA service would be analogous to the current referencing of custom calling features in the present interstate Feature Group A tariff.[588]

265. The BellSouth and Bell Atlantic plans do not discuss tariff referencing in detail. Ameritech's plan, which proposes some unbundling of federal access tariffs so that Ameritech can offer fully tariffed federal BSEs under our Part 69 access tariff rules, is also silent on the question of whether it would reference CNSs that it would continue to tariff at the state level. The Ameritech plan implies that it would continue its present rate referencing practices for packet switched services.[589] Pactel's plan is unclear on whether it will employ referencing.[590]

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585 Id. at 367.

586 SWBT Plan at 89; SWBT Reply at 27-28.

587 Id. at 27-28.

588 NYNEX Plan at 96-97.

589 Ameritech Plan at 95. This Commission subsequently determined that the rate referencing waiver for BellSouth packet switching services was not justified, but waived 47 U.S.C. § 61.38 and permitted BellSouth to file its currently-effective intrastate rates for packet switching service in its interstate tariff. BellSouth Corporation, Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations to Authorize Protocol Conversion offerings, AAD 5-1230, FCC 88-333, released Dec. 6, 1988.

590 See, e.g., Pactel Reply at 36 (alluding to referencing state tariffs for packet switching service).

266. Various parties object to the BOCs' cross-referencing or rate-referencing proposals.[591] Some claim that these practices would deprive us of oversight over the referenced ONA services.[592] Telenet states that this Commission's experience with packet switching argues strongly against permitting such referencing.[593] MCI contends that we have an obligation to obtain the necessary cost data and relevant information before we can properly determine whether an interstate tariff filing is just, reasonable, and nondiscriminatory.[594] CONAP notes that incorporation by reference is not legally permissible when state and federal policies are inconsistent, as it claims is the case for ONA.[595] AT&T states that rate referencing would permit BOCs to set rates, terms, and conditions of interstate BSEs on the basis of state policies or assignment of costs instead of federal policies, and in addition, would be administratively inefficient for users.[596] CBEMA contends that rate referencing would enable BOCs such as SWBT and BellSouth to apply state-tariffed use restrictions to federally-tariffed offerings.[597]

267. However, Minnesota supports referencing of state tariffs.[598] MPC states that cross-referencing may be a way to preserve a general oversight role by this Commission, without displacing state regulatory authority over intrastate services.[599]

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591 See, e.g., ADAPSO Comments at 50; ANPA Comments at 25-26; Hatfield Comments at 102; Hatfield Reply at 6; Telenet Comments at 36; AT&T Comments at 13-15; TCA Comments at 8; CONAP Comments at 72-73.

592 See, e.g., ADAPSO Comments at 50; Telenet Comments at 36.

593 Telenet Comments at 36. Telenet argues that rate referencing leaves this Commission with little knowledge of the rates or their cost basis and deprives us of practical control over the process. Id.

594 MCI Reply at 34.

595 CONAP Comments at 72-73.

596 AT&T Comments at 13-15.

597 CBEMA Comments at 49.

598 Minnesota Comments at 5-6.

599 MPC Reply at 4.

(iii) Changes to Part 69

268. BOCs other than Ameritech do not discuss the integration of switched BSEs tariffed at the federal level into the interstate access structure of Part 69 of our rules other than through some form of cross-referencing.[600] Ameritech states that, under its tariffing proposal, a modification or waiver of the Part 69 rules is required so that the costs of providing the BSEs to be unbundled in the federal access tariffs would not be charged to all switched access customers.[601] Ameritech asserts that the costs of its initial set of BSEs are related only to switching. It proposes to unbundle BSE costs from the switching access element.[602] Ameritech states that modification or waiver of Sections 69.106, 69.205, and 69.206 of our rules[603] would be necessary to disaggregate the local switching category for this purpose.[604]

269. Ameritech states that in order to avoid any uneconomic incentives created by implementing a "dedicated transport to first point of switching" rate structure for ONA, while being prohibited from doing so under the MFJ for interexchange carrier access, it will use the existing federal and state rate structures until such time as all access tariff offerings are moved to a more cost causative structure.[605]

270. ESC supports the modification or waiver of Sections 69.106, 69.205, and 69.206, apparently as Ameritech proposes, in order to allow BOCs to disaggregate local switching and charge switched access customers only for BSEs they actually purchase.[606] The Ameritech States say that they

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600 As discussed infra, paras. 278-80, many BOCs propose extensive cross-referencing or rate-referencing of such BSEs.

601 Ameritech Plan at 127.

602 Id. at 127; Ameritech July 14, 1988, Ex Parte, supra note 447, at 17-20. Basic switched access service presently requires payment of carrier common line, transport, and local switching charges.

603 47 C.F.R. §§ 69.106 (Line Termination), 69.205 (Transitional Premium Charges) and 69.206 (Transitional non-premium charges for MTS-WATS equivalent services).

604 Ameritech Plan at 127.

605 Id. at 94-95.

606 ESC Comments at 16-17. ESC also favors disaggregation of transport and non-traffic sensitive (NTS) costs.

would oppose a waiver of the Part 69 rules, unless the rates for BSAs and BSEs include part of the NTS costs of providing these services, pursuant to fully distributed costing (FDC) principles.[607] TCG states that if BOCs offer ONA through federal access tariffs, they should not be allowed to assess local transport "Facility" and "Termination" charges for services provided instead by alternative carriers. It states that the local transport waiver would no longer be appropriate and that costs for common transport, dedicated transmission facilities, and conditioning of those facilities should be described separately.[608] MCI suggests that interstate tariffs for ONA services need not contain traffic sensitive (TS) and NTS cost components associated with current Feature Group access services so long as the current ESP exemption from the imposition of access charges exists.[609]

2. Discussion

271. The extent of this Commission's jurisdiction over ONA services for tariffing and pricing purposes and the manner in which we exercise that jurisdiction raise important and complex issues that have attracted considerable attention in this proceeding. As we made clear throughout Computer III, ONA is a critical federal policy initiative that is designed to provide the regulatory and competitive framework within which advanced "Information Age" services can be brought efficiently to the American public. In our view, ensuring the successful realization of this initiative is part of our responsibility under the Act to make available, so far as possible, to all the people of the United States efficient, nationwide communications services at reasonable charges. Accordingly, there are significant federal interests in ensuring that ONA is developed and implemented in a manner that fulfills these goals.

272. At the same time, we recognize that ONA, as a means of providing nondiscriminatory, efficient network access to enhanced service providers, is important to individual states, as well as to the nation as a whole.[610] In particular, since ONA requires the unbundling of basic services

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607 Ameritech States Comments at 17.

608 TCG Comments at 25-26, citing, inter alia, AT&T Co., 94 FCC 2d 545, 548 (1983); MTS/WATS Market Structure, CC Docket No. 78-72, FCC 85-87 (released Feb. 27, 1985), reprinted in 50 Fed. Reg. 9633 (Mar. 11, 1985).

609 MCI Comments at 35 n.48.

610 See, e.g., New York Public Service Commission, Case No. 88-C-004, Proceeding on Motion of Commission to Review Telecommunications Industry Interconnection Arrangements, Open Network Architecture, and Comparably Efficient Interconnection; An Investigation Into the State-Wide Offering of Access to the Local Exchange Network for the Purpose of Providing Information

that may be used for intrastate as well as interstate communication, it involves matters of state, as well as federal, concern. We are mindful of the states' legitimate interests in the intrastate basic services that are a component of ONA, which are reflected in the Congressional directive in the Act that such services are to be subject to state, not federal, regulation. Parties that address jurisdictional issues in their pleadings marshal both legal and policy arguments justifying their view of appropriate Commission involvement in this area. We consider first the extent of our legal authority over the basic ONA services that BOCs propose in their plans, and then examine the policy goals that inform our exercise of that authority.

a. Legal Issues

273. As many parties note, we have well-settled authority to assert jurisdiction over facilities and services used in interstate communications, including, of course, some ONA services that the BOCs propose to tariff on the state level. That authority primarily stems from Section 2(a) of the Act,[611] in which Congress granted this Commission power to regulate, inter alia, "all interstate and foreign communication by wire or radio...." In defining "wire communication" as "the transmission of writing, signs, signals, pictures, and sounds of all kinds...between the points of origin and reception of such transmission," including "all instrumentalities, facilities, apparatus, and services...incidental to such transmission,"[612] the Act specifically conceives of "communication" as end-to-end in nature. The Act also defines "interstate communication" or "interstate transmission" as, inter alia, "communication or transmission (1) from any State...to any other State...." Interpreting these definitions, the courts have construed our jurisdiction as applying to all "services" and "facilities" used at any point in completing an interstate telephone call.[613] Indeed, we would be incapable

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Service, Florida Public Service Commission Docket No. 88-0423-TP; Maine Public Utilities Commission Proposed Rulemaking on the Provision of Competitive Telecommunications Services (Chapter 28), Docket 87-3.

611 47 U.S.C. § 152(a).

612 47 U.S.C. § 153(a).

613 As the U.S. Court of Appeals for the D.C. Circuit explained in its NARUC decision, which upheld this Commission's prohibition of resale and sharing restrictions on intrastate WATS used for interstate traffic, "purely intrastate facilities used to complete even a single interstate call may become subject to FCC regulation to the extent of their interstate use." 746 F. 2d at 1498. See also New York Telephone Co. v. FCC, 631 F. 2d 1059, 1065-66 (2d Cir. 1980).

of carrying out our statutory objectives if we had no authority over any facility that carries interstate calls but is physically intrastate.[614]

274. We do not accept Bell Atlantic's argument that basic services used with interstate enhanced services are not subject to interstate tariffing under Title II of the Act. Bell Atlantic seems to reason that because enhanced services are not common carrier services under Title II, the basic services that underlie enhanced services are somehow also not subject to Title II. We do not agree. Enhanced services by definition are services "offered over common carrier transmission facilities."[615] Since the Computer II regime, we have consistently held[616] that the addition of the specified types of enhancements (as defined in our rules) to a basic service neither changes the nature of the underlying basic service when offered by a common carrier nor alters the carrier's tariffing obligations, whether federal or state, with respect to that service.[617] Computer III does not change this principle. Indeed, we have explicitly held that "the basic services involved in such [CEI/ONA] offerings are to be tariffed in the appropriate federal or state jurisdiction."[618] Thus, when an enhanced service is interstate (that is, when it involves communications or transmissions between points in different states on an end-to-end basis), the underlying basic services are subject to Title II regulation.[619]

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614 NARUC, 746 F. 2d at 1499. See also Southwestern Cable, 392 U.S. at 169 (1968). Of course, Section 2(b)(1) of the Act, 47 USC §152(b)(1), reserves to the states jurisdiction over intrastate, common carrier communications services.

615 Section 64.702 (a) of this Commission's Rules, 47 C.F.R. § 64.702 (a).

616 See, e.g., American Telephone and Telegraph Co. (Basic Packet Switching Service), 94 FCC 2d 48, 54-55 (1983).

617 Thus, an otherwise interstate basic service -- and Bell Atlantic does not contest that its BSEs are basic services and, in the circumstances being discussed, are being used in the transmission of messages (data or voice) that originate in one state and terminate in another (albeit, as a result of being carried across state lines by the enhanced service provider's network)-- does not lose its character as such simply because it is being used as a component in the provision of a service that is not subject to Title II.

618 Phase I Order, 104 FCC 2d at 1128, para. 348.

619 We also note that one of the premises of Bell Atlantic's argument-- that "the Commission... has expressly defined enhanced service activities as non-communications activities..." (Bell Atlantic Reply at 22)-- is incorrect. As the authorities that Bell Atlantic cites demonstrate, see id. at 22 n. 50, we have found enhanced services to be non-common-carrier activities and

275. New England argues that as a matter of equity, the states should have the authority over ONA implementation and tariffing because the separations rules assign the costs of most ONA facilities to the intrastate jurisdiction.[620] Other parties ask that we revise the separations rules, in some unspecified way, to account for ONA. While we agree with New England that separations and tariffing policies should be consistent to avoid cost/revenue mismatches, we do not think this principle compels a particular jurisdictional result for the tariffing of ONA services. ESPs currently take services out of both intrastate and interstate tariffs, and the costs of the facilities involved are divided between the jurisdictions according to normal separations principles. The information presented in this record does not demonstrate that this process has had any unusual or otherwise untoward effects in terms of matching cost allocations and revenue recovery[621] or that the implementation of ONA services would change this situation.[622] Indeed, it is not clear that ONA will have a substantial impact on separations allocations at all, let alone produce any inappropriate mismatch of jurisdictional costs and revenues.[623] Accordingly, we do not think that

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hence not subject to Title II of the Act. We have never ruled, however, that enhanced services are not "communications" services under Title I of the Act, and indeed have explicitly asserted ancillary jurisdiction under Section 2(a) over the provision of enhanced services by common carriers. Second Computer Inquiry, 84 FCC 2d 50, 93, para.125 (1980), further modified on reconsideration, 88 FCC 2d 512 (1981), aff'd sub nom. Computer and Communications Industry Ass'n v. FCC, 693 F. 2d 198 (D. C. Cir. 1982), cert. denied, 461 U.S. 938 (1983), aff'd on second further reconsideration, FCC 84-190, released May 4, 1984.

620 New England Comments at 4, 6.

621 For example, ESPs often use ordinary business lines for local exchange access. The costs of such lines are separated according to the flat-rate NTS allocation, 25% interstate, 75% intrastate. The interstate share of the costs are recovered through federal subscriber line charges, and the intrastate share through local business line charges, with the resulting revenues assigned to the appropriate jurisdiction.

622 While ALC alleges there will be separations-related problems with SWBT's proposed approach, it appears to be referring to that BOC's proposal for extensive cross-referencing of state-tariffed BSEs in federal tariffs, a practice that we do not approve in this Order. See infra note 626.

623 We note that the costs for many BSEs that carriers have proposed in their ONA plans will be separated along with other Category 3 switching costs on the basis of Dial Equipment Minutes (after a transition), a measure of relative switched usage, so that some of the costs of providing these

there is a need at this time for any separations rule changes to accommodate ONA implementation.[624]

b. Federal Tariffing of ONA Services

(i) General Approach

276. Based on the principles just discussed, we have jurisdiction over the interstate aspects of common carrier services like the ONA offerings described in the BOCs' plans. We concur with most commenters that there are several important policy considerations favoring federal tariffing of ONA services. Because ESPs use ONA services on both an interstate and intrastate basis, the proper exercise of federal authority is critical to successful implementation of ONA objectives, including prevention of discrimination and anticompetitive activity in the enhanced service marketplace on the part of the BOCs. Furthermore, we believe that in order to further the goals of ONA in the interstate services area, purchasers of interstate access services should be able to purchase ONA features for use with these access services. We therefore require each BOC to provide ONA services through federal tariffs by treating its interstate access services as BSAs and offering unbundled interstate BSEs[625] with such access services when it is technically feasible to do so. None of the BOCs' current proposals for federal tariffing of ONA services fully complies with this requirement (although Ameritech's comes quite close).[626] We intend to initiate a rulemaking to amend Part 69 to

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services will be separated to the interstate jurisdiction and included in the rates for federal access services. See generally Letter from Martin E. Grambow, SWBT, to H. Walker Feaster, Acting Secretary, FCC, dated July 20, 1988. If ESPs were to purchase a substantial amount of ONA services from federal access tariffs, increasing their purchases of interstate accesss services (relative to, say, local business lines), there would be a corresponding increase in interstate DEMS which would in turn produce an increase in the allocation of these costs to the interstate jurisdiction.

624 We recognize, however, that as ONA develops and as new network technologies are introduced, there could be a need for revisions to our separations rules. We will, of course, monitor this situation in consultation with the states.

625 By "interstate BSEs" we refer to those basic services requested by ESPs, whether now classifed as BSEs, CNSs, or ANSs in the various plans, that satisfy our BSE selection criteria. See supra paras. 112, 130-35.

626 Those plans that propose referencing of state tariffs in federal tariffs clearly do not conform with this requirement. Ameritech proposes unbundled federal tariffing of BSEs, but does not appear to propose such treatment for the full range of interstate BSEs we describe herein.

provide for the inclusion of unbundled ONA services in the federal access tariffs.

277. We could also regulate the interstate portions of even those ONA services that the BOCs, apparently uniformly, propose to tariff in the state jurisdiction; for example, a CNS like call forwarding on busy or no answer routinely handles not only intrastate, but interstate calls,[627] and we theoretically could require dual federal/state tariffing or possibly even exclusive federal tariffing (with appropriate changes in the separations rules) for such a service. At this time, we see no need to require separate federally tariffed charges for such service.[628] We take this approach to minimize the disruptive effects of initial ONA implementation on current tariffing practices, as well as to harmonize the introduction of ONA with other, existing federal and state policies. In the following paragraphs, we discuss the relationship among our ONA requirements, the BOCs' tariffing and pricing proposals, and current federal and state practices.

(ii) Use of Access Tariffs

278. In examining the ONA services proposed in the BOC plans, we note that, in effect, significant dual tariffing has already occurred with respect to many of the proposed BSAs. The interstate access tariffs describe access arrangements, such as the feature groups, that have many of the same functional characteristics as the BSAs that the plans propose. Indeed, Ameritech expressly relies on federal- and state-tariffed access services as BSAs, and US West relies on these services as the access arrangements that support BSEs, although it does not use the term BSA. Because of this close technical similarity, we could treat the feature groups and other interstate

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627 For example, Call Forwarding may be used to forward an incoming interstate call to a second number in the same state as the called number; or, for example, the service may be used to forward a call originating in the same state as the called number to an out-of-state number.

628 This arrangement does not mean that this Commission has ceded jurisdiction over such services. The costs that are associated with these services are in fact apportioned between jurisdictions pursuant to the separations rules and the interstate portion of the costs are recovered through the interstate access charges. Since most of the costs are likely to be found in Central Office Equipment Category 3, the interstate portion of the costs are bundled into the Local Switching access elements that interexchange carriers or ESPs pay and are indirectly recovered from users through the interexchange or ESP charges. The separate charges in state tariffs represent intrastate use charges and the revenues are accordingly included in local service revenue accounts under our accounting rules.

access arrangements now tariffed under our federal access rules as "interstate BSAs." However, we defer to an upcoming rulemaking, discussed below,[629] the issue, suggested in some parties' comments, of whether BOCs should be required to assess ESPs something other than generally applicable interstate access charges for such "interstate BSAs."[630] Inclusion of ONA services in the access tariffs, which have largely uniform formats and terms and conditions, also addresses at the federal level some parties' expressed desires for increased uniformity in ONA tariffs.

279. Purchasers of interstate BSAs should be able to obtain BSEs from the federal tariffs as well. Accordingly, we require the BOCs to make their interstate BSEs, as defined above, available with federally tariffed interstate BSAs. We require full federal tariffing[631] of such BSEs.[632] We will consider in our upcoming Part 69 rulemaking whether to permit ESPs or others to "mix and match" BSEs and BSAs from different tariffs by, for example, taking interstate BSEs with intrastate access arrangements, such as state-tariffed business lines, rather than federally tariffed BSAs.[633]

280. We do not require that full federal tariffing apply to CNSs, however. By definition, CNSs are state-tariffed services provided to end users.[634] Many of these CNSs are in the nature of "Custom Calling" services, such as call waiting and call forwarding; variations of such services, such

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629 See infra paras. 281-82.

630 See, e.g., MCI Comments at 28 n.48 (arguing for omission of certain access charge components from ESP charges).

631 For purposes of this discussion, by "full federal tariffing" we mean both the inclusion of a service in a federal tariff and the application of federal ratemaking principles and regulatory review to the service. We do not refer simply to a carrier's cross-referencing state tariffs in a federal tariff or otherwise making a state-tariffed ONA feature available with a federally tariffed service.

632 We do not grant BOC requests included in some ONA plans for waiver of Section 61.74 of our rules, 47 C.F.R. § 61.74, which generally prohibits referencing of state tariffs in federal tariffs. See, e.g., SWBT Plan at 89-90. However, parties may request such waivers in the context of particular tariff filings, but must explain why they are justified in light of the policies stated in this Order. We do not modify any such existing waivers, or any current tariffing practices, in this Order.

633 See infra paras. 281-82.

634 See supra para. 83.

as call forwarding on busy or no answer; and other optional features, such as hunting. In exerting our jurisdiction over ONA services, we balance the need for federal guidance in specific areas against the possibility of inefficient or disruptive effects on present regulatory policies. We believe that continuation of current tariffing treatment of CNSs, at least as an interim measure, will help minimize the disruptive effects of ONA implementation on the states. Thus, we do not require as a condition of ONA plan approval that CNSs be tariffed as federal services. We will, however, continue to monitor the ONA implementation process to assess whether such federal tariffing may become necessary at some future date.[635]

(iii) Changes in Part 69

281. Ameritech has correctly observed that the unbundling of BSEs is not consistent with some of the requirements in the Part 69 access charge rules. For example, most costs that would be attributable to a BSE are apportioned to the Local Switching access elements and the rules do not permit the exchange carriers to create Local Switching subelements. We will initiate a rulemaking proceeding in the near future to modify the Part 69 rules as necessary to accomplish fully the integration of ONA services into our existing access tariff structure.[636] We expect this rulemaking proceeding to address a number of issues, including: what Part 69 rate elements, if any, require unbundling to accommodate interstate BSEs; to what extent should such unbundling take place; what, if any, changes in the apportionment of investment and expenses are required; how should BSE rates and costs be formulated; and to what extent would Computer III pricing requirements, including the Basic Interconnection Charge and the Basic Concentration Charge, continue to be necessary.

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635 In the near future, it could develop that exclusive state tariffing for these services could, at least in certain cases, jeopardize the pro-efficiency, antidiscrimination goals of ONA. While in such circumstances we could simply withdraw our approval of that BOC's ONA plan, we could also, either as an alternative or complementary approach, require federal tariffing of any service that carries interstate traffic. Furthermore, after the initial implementation of ONA is complete, and we have amended our Part 69 rules to provide for greater unbundling in the federal tariffs, requiring additional federal tariffing of ONA services should be less disruptive. See infra paras. 281-82. Thus, it is possible that in the future the costs of such mandatory federal tariffing could be less and the benefits could be greater.

636 This would not foreclose BOCs that wish to offer BSEs through our access tariffs in the period before we modify Part 69, from applying for any necessary waivers of the Part 69 rules.

282. This upcoming rulemaking will also examine changes in the Part 69 rules that may be necessary to implement an interstate BSA offering. The service functions that underlie the present Carrier Common Line, Local Switching, and Transport elements in our interstate access tariffs collectively are equivalent to the functions that would underlie a switched, interstate BSA. As suggested in some comments,[637] we will examine whether the BOCs should be required to charge something other than generally applicable interstate access charges for such BSAs.

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637 See, e.g., CompuServe Comments at 20, 22-24 (objection to imposition of TS and CCL charges on ESPs).

D. State Tariffing of ONA Services

1. Summary

283. As stated above,[638] we require federal tariffing of BSAs and BSEs used for interstate purposes, and plan to initiate a rulemaking to modify the interstate access charge structure to accommodate this requirement. On the federal level, BOC ONA tariffing arrangements must conform to our Part 69 requirements, as amended, and to the federal policies that those requirements implement. As we have often recognized, however,[639] our jurisdiction over intrastate tariffed services is limited. For this reason, we scrutinize BOC state tariffing proposals to ensure only that they do not undermine fundamental ONA objectives, particularly with respect to preventing anticompetitive or discriminatory effects on ESPs, and that they are sufficiently clear and complete to be useful to us and to ESP competitors in determining that our requirements are satisfied.

284. We find that none of the various provisions in the BOC tariffing plans, as filed, pose a fundamental threat to ONA objectives that would preclude ONA plan approval, with the single exception of that portion of the BellSouth plan that would deny ESPs the right to continue to take existing services. As a matter of clarity and completeness, we find that the Ameritech and NYNEX plans are sufficiently detailed to enable us to conclude that these BOCs' state tariffing approaches are acceptable for purposes of ONA plan approval and the removal of the structural separation requirements. Each of the other BOCs must provide additional information on its tariffing plan by May 19, 1989. Furthermore, BellSouth and SWBT must clarify and/or justify certain use restrictions in their plans. BellSouth must also amend its plan to allow ESPs to continue to take existing services.[640]

2. Positions of the Parties

a. Tariff Structure and Pricing

285. In commenting on the BOCs' tariffing proposals, parties address a wide array of specific topics. In general, however, the NYNEX and Ameritech tariffing proposals receive the most support from commenters. For

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638 See supra Section IX.C.

639 See, e.g., Phase I Further Reconsideration, 3 FCC Rcd at 1143-44.

640 See infra paras. 321-22.

example, several parties support Ameritech's proposed tariffing approach.[641] Some of these observe that the Ameritech approach of filing tariffs with the state and federal jurisdictions will allow every jurisdiction the opportunity to review ONA rate levels, terms, and conditions.[642] Tymnet and AT&T approve of Ameritech's use of tariffs that will be cost-based.[643] AT&T favorably observes that Ameritech plans to provide consistency between federal and state tariffs, and hence, uniformity in the way ONA services are offered.

286. Tymnet and CONAP also support the NYNEX tariffing proposal.[644] Dun & Bradstreet supports the NYNEX position that ONA functionalities should be tariffed no differently than other services and existing tariffs should be used whenever possible.[645] Dun & Bradstreet states that NYNEX's approach, tariffing ONA elements used for intrastate purposes in state jurisdictions and those used for interstate purposes in the federal jurisdiction, while engrafting ONA elements onto existing tariffs, is theoretically correct. It states that this Commission should require the other BOCs to use existing tariffs to implement ONA. In this way, it argues, end users retain the ability to take the carrier's services, and new BSEs and BSAs can be engrafted onto existing tariffs to permit any users to take ONA services in a truly "open" network.[646]

Bundling of BSEs with BSAs

287. A number of parties object to what they describe as BOC plans to "bundle" or "tie" BSEs with BSAs -- that is, the proposals of four BOCs -- Ameritech, BellSouth, Pactel, and SWBT -- to offer BSEs only with a limited set of BSAs.[647] AICC and IIA state that such restrictions are not predicated

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641 AT&T Comments at 11-12; Telenet Reply at 8; Tymnet Comments at 37; CONAP Comments at 67.

642 Tymnet Comments at 37; Telenet Reply at 8; AT&T Comments at 11-12. Cf. CONAP Comments at 67 (Ameritech and NYNEX Plans seem to state that functionalities used for intrastate purposes will be tariffed in state jurisdictions, while services utilized for interstate purposes will be tariffed with this Commission).

643 Tymnet Comments at 40; AT&T Comments at 12.

644 Tymnet Comments at 40; CONAP Comments at 67.

645 Dun & Bradstreet Comments at 39.

646 Id. at 39-40.

647 See, e.g., AICC-Pactel Comments at 10-11; ANPA Comments at 22-23; IIA Comments at 12, 14-16; Hatfield Reply at 14; Telenet Comments at 46: ADAPSO

on technical feasibility.[648] US Sprint states that the fact that some BOCs allow BSEs to be used with existing access arrangements indicates that tying BSEs to BSAs cannot be justified on technical grounds.[649] Some parties claim that the BOCs propose such BSA/BSE bundling in order to increase rates.[650] ANPA and CONAP state that requiring an ESP to obtain a BSA is contrary to our ONA objectives that ESPs should pay only for the basic services the ESPs want. CONAP specifically objects to the use of new state tariffs that will force ESPs to abandon existing access arrangements in order to gain the benefits of BSEs.[651] Similarly, IBM argues that the bundling of BSEs with BSAs, "together with discriminatory pricing of the BSAs," could frustrate this Commission's objective of ensuring the availability of basic service building blocks on a nondiscriminatory basis.[652] ADAPSO, CompuServe, and Tymnet object that these BOCs propose to use ONA tariffs simply to reprice services identical to existing network functions.[653] Dun & Bradstreet attacks such plans as discriminatory tying arrangements that force ESPs to choose between existing tariffed services without any optional network features and new high-priced BSAs with such features.[654] US Sprint characterizes such arrangements

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Comments at 52; MCI Reply at 16; US Sprint Comments at 16-20; IBM Comments at 8-9; CONAP Comments at 22; CONAP Reply at 14; ICA Comments at 6. The parties appear to be divided on how to interpret the US West Plan. For example, while ANPA criticizes the US West Plan for making some BSEs available only in conjunction with certain BSAs, see ANPA Comments at 22, IIA approves of the US West and NYNEX Plans for offering BSEs with business line access arrangements, see IIA Comments at 14.

648 AICC Reply at 7-8; IIA Comments at 12, 14-16.

649 US Sprint Comments at 20.

650 See, e.g., IIA Comments at 14-17; ADAPSO Comments at 22-23; Telenet Comments at 13, 42-43; API/Wells Fargo Comments at 7-8.

651 ANPA Comments at 22-23, citing SWBT Plan at 24, US West Plan at 19 and Phase I Order, 104 FCC 2d at 1064, para. 214; CONAP Comments at 23-24.

652 IBM Comments at 9.

653 ADAPSO Comments at 22-23 & n. 42; Tymnet Comments at 49-50 & n.105; CompuServe Comments at 22-23, citing SWBT Plan, Appendix 15B, at 1-2, Ameritech Plan at 96. See also Telenet Comments at 45 n. 38.

654 Dun & Bradstreet Comments at 27-28. Dun & Bradstreet states that Pactel's plan is unclear in this area, because it states that bulk tariffed BSEs can only be purchased using the appropriate BSA structure and leaves open the question of whether non-bulk tariffed BSEs will be available with existing access arrangements.

as use restrictions and also argues that the BOCs have failed adequately to justify such restrictions, as Computer III requires them to do.[655]

288. Many parties that criticize the bundling of BSEs with BSAs support the relatively open NYNEX tariffing approach. Dun & Bradstreet, for example, approves of NYNEX's use of existing tariffs to implement ONA by engrafting BSAs and BSEs onto those tariffs.[656] IIA also favors NYNEX's use of existing access arrangements.[657] The NYNEX Reply observes that it permits ESPs who are currently subscribing to existing services to continue doing so and to add BSEs to their existing services in accordance with their own business judgment.[658] Telenet asks that BSEs be available to subscribers of state-tariffed business lines as well as to subscribers of BSAs, as NYNEX in fact proposes.[659]

Pricing Methodology

289. The pricing methodologies proposed in the BOC plans for ONA services attracted a considerable amount of attention in the comments. As a general matter, many parties strongly argue for "cost-based" pricing.[660] Those parties contend that non-cost-based pricing, which such parties variously define as a "contribution" to residential service,[661] market-based

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655 US Sprint Reply at 11-13.

656 Dun & Bradstreet Comments at 39-40.

657 IIA Comments at 14.

658 NYNEX Reply at 74.

659 Telenet Comments at 46.

660 See, e.g., Ameritech States Comments at 6, 13-15; Ameritech States Reply at 15-16; Illinois Reply at 2, 4; NTIA Reply at 9; US Sprint Comments at 36; MCI Comments at 31-32; ADAPSO Comments at 55-56; AICC Reply at 9-10; ATSI Comments at vi, 26-27; ATSI Reply at 2; CompuServe Comments at i, 18-24; EDS Reply at 10, 12, Hatfield Comments at 108; Hatfield Reply at 20-21; IIA Comments at 20, 22; IIA Reply at 6; Telenet Comments at 46; IDCMA Comments at 32-36, 60; API Comments at 11; CONAP Comments at 3-4; Dun & Bradstreet Comments at 7; TCA Comments at 6; ICA Comments at 6-7; ICA Reply at 4.

661 See, e.g., ADCU Comments at 35-36; IIA Comments at 20, 22. See also ATSI Comments at 26-27.

pricing,[662] strategic pricing,[663] value-of-service pricing,[664] or pricing based on incremental cost,[665] is unjustified for monopoly services.[666] Such pricing, they argue, cannot be reconciled with ONA objectives and pricing rules,[667] the requirements that rates be just, reasonable, and nondiscriminatory,[668] and or the goal of economic efficiency in the allocation of telecommunications resources.[669] Many parties also argue that non-cost-based pricing could foster anticompetitive and discriminatory activities by the BOCs,[670] encourage tariff shopping and bypass by ESPs and IXCs,[671] and result in "rate shock."[672]

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662 See, e.g., ADAPSO Comments at 30-31; ADCU Comments at 35-36; ATSI Comments at 26; Joint Parties Comments at 4.

663 IIA Comments at 21-23; AICC- BellSouth Comments at 12; MCI Reply at 13, 29-30; US Sprint Reply at 2; AT&T Comments at 12 n.**. AT&T states that at a minimum, strategically priced ONA services should be made subject to the ongoing investigation in CC Docket No. 85-166.

664 See, e.g., ADAPSO Comments at 55-56, 30-36.

665 See, e.g., CompuServe Comments at 18-24 & n.54; AICC-SWBT Comments at 11.

666 IDCMA Comments at 33.

667 See, e.g., US Sprint Reply at 6-7; ADAPSO Comments at 32-36; ADT Comments at 15; ATSI Comments at 27; IIA Comments at 22-23; AICC-Bell South Comments at 5-7 & 12; AICC-NYNEX Comments at ii, 5-6; AICC-Bell Atlantic Comments at 4-7; IDCMA Comments at 35-36; ICA Comments at 6-8.

668 US Sprint Reply at 6. Cf. CBEMA Comments at 31 (state costing and ratemaking principles are often different from and inconsistent with those of this Commission).

669 ANPA Comments at 25; ATSI Comments at 27; IIA Comments at 22; US Sprint Comments at 36.

670 ANPA Comments at 25; ATSI Comments at 27; Hatfield Reply at 20-21; AICC-Bell Atlantic Comments at 4-5; MCI Comments at 32-33; US Sprint Comments at 36; US Sprint Reply at 7-8; IDCMA Comments at 34-35; API Comments at 11-12; ICA Comments at 7.

671 US Sprint Comments at 36.

672 US Sprint Reply at 8-9.

290. On the other hand, other parties argue that ONA pricing should not encroach on states' ability to ensure low prices for traditional phone service.[673] These parties generally express concern that "contributions" to universal service, and in particular residential service, be maintained,[674] and that the "cost-causer", presumably the ESP and not local ratepayers, be required to pay for new or additional services.[675] The Ameritech States favor the use of fully distributed costing (FDC), whereby all services would be charged a portion of fixed and nonrecurring costs. The Ameritech States oppose the position of those parties, citing ESC and Telenet, that object to ESPs' paying a part of the fixed costs of the network.[676] MPC states that Commission requirements mandate fully distributed or stand alone costing so that ONA users, and not basic service ratepayers pay for the new technology that ONA uses.[677]

291. Several parties support Ameritech's proposed tariffing approach because Ameritech uses cost-based pricing.[678] For example, AT&T states that Ameritech's plan proposes a tariffing structure that should serve as a model for other plans, noting with approval that Ameritech's interstate tariffs will be based on the cost-based pricing methodology established by this Commission in its Part 69 rules, and that its intrastate tariffs will mirror its interstate tariffs, in order to provide uniformity in the way ONA services are offered.[679] CompuServe, however, criticizes Ameritech's approach to the extent that it includes non-cost-based contributions to the carrier common line (CCL) pool required by Part 69 of our rules.[680]

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673 New England Comments at 13-14; NTIA Comments at 8, 31.

674 New England Comments at 16-17; Noam Comments at 24.

675 New Jersey Reply at 4; Ameritech States Reply at 15-16.

676 Ameritech States Comments at 6, 14; Ameritech States Reply at 15-16, citing ESC Comments at 16-17 and Telenet Comments at 45 n. 38.

677 MPC Comments at 4. MPC also suggests, however, that strategic pricing might be a means of reimbursing residential ratepayers for losses involved in the replacement of usable plant by new ONA-driven investment. MPC Reply at 6-7.

678 See, e.g., AT&T Comments at 12; ADAPSO Comments at 30; ADCU Comments at 35-40; ATSI Comments at 26; IBM Comments at 6; Tymnet Comments at 40.

679 AT&T Comments at 11-12. See also Tymnet Comments at 37, 40.

680 CompuServe Comments at 20. See also AICC-Ameritech at 8-9 (criticizing Ameritech's reliance on usage-sensitive pricing).

292. Although many parties support the proposed NYNEX tariff structure,[681] AICC fears that NYNEX's statement that it will price ONA elements based on the methodology acceptable to the appropriate jurisdiction, and its inclusion of sample tariffs showing the use of flexible pricing, threatens to violate our pricing requirements and to result in time-consuming waiver proceedings.[682] NYNEX responds that AICC mischaracterizes the flexible pricing permitted in its state tariffs. NYNEX states that under the tariff, it may adjust rates up or down within a fixed, previously approved, range (minimum or maximum), upon appropriate notice. NYNEX states that such flexibility would allow NYNEX to adjust its price in response to the competitive marketplace, while preventing NYNEX from dropping its price below costs or raising it to an unwarranted level.[683]

293. Commenters also specifically address aspects of other plans. New Jersey supports Bell Atlantic's pricing methodology as a reasonable approach to a difficult problem.[684] Hatfield supports Bell Atlantic's use of density cell pricing, saying that it reflects true costs.[685] Hello, however, believes that Bell Atlantic should expand on its view that there are no more cost effective methods of developing rates than those that currently exist, which Bell Atlantic already uses in its ratemaking.[686]

294. CompuServe notes that US West's plan is ambigucus as to the pricing methodology it will employ.[687] ANPA, ATSI and IIA object to what they describe as US West's attempt to charge market-based or strategically-priced rates.[688] A number of parties also object to SWBT's use of rates based on

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681 See supra para. 286.

682 AICC-NYNEX at ii, 5-6.

683 NYNEX Reply at 35 n.54.

684 New Jersey Comments at 6. New Jersey states that pricing of ONA elements should stimulate the marketplace, cover relevant costs, and minimize the the risk of placing revenue pressures on other rates. New Jersey Reply at 6.

685 Hatfield Comments at 108.

686 Hello Comments at 18-19.

687 CompuServe Comments at 20-21.

688 ANPA Comments at 24-25; ATSI Comments at vi, 26-27; IIA Comments at 21-22.

market pricing or contribution.[689] Tymnet observes that SWBT's methodology results in dramatic and arbitrary differences between cost and price in a wide variety of SWBT services, including, for example, a 3233% markup on rotary hunting service. Such pricing, it argues, includes substantial deviations from cost in markups of components of competitively sensitive services like packet-switched BSAs and circuit-switched, voice-grade BSAs.[690]

295. Similarly, parties criticize Pactel's use of non-cost based pricing.[691] ADCU objects to Pactel's use of usage-sensitive rates, stating that its proposed 1M1 offering for the use of ESPs is nothing more than an existing measured business line marked up 300%.[692] Many parties also object to BellSouth's variously labeled "strategic", "value-of-service" or "market" pricing proposal,[693] with CompuServe and Tymnet stating that BellSouth's pricing scheme is the most egregious of those in the BOCs' plans.[694]

296. NYNEX states that, contrary to commenters' assertions, it does not propose "market based" or "strategic" pricing. It states that stimulation of network usage, which it desires to attain, can only occur if ONA services are priced close to cost.[695] NYNEX believes that price uniformity and stability and market stimulation are essential to the ONA goal of ensuring availability of ONA services.[696]

297. Replying to criticisms of its pricing, Pactel states that this Commission contemplated case-by-case pricing of ONA elements pursuant to

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689 See, e.g., ADCU Comments at 35-40; ATSI Comments at vi, 26-27; IIA Comments at 20-22.

690 Tymnet Comments at 42.

691 ADCU Comments at 36; CompuServe Comments at 19; IIA Comments at 20-23; ADT Comments at 15.

692 ADCU Comments at 36-40.

693 See, e.g., ADCU Comments at 35-40; AICC-BellSouth Comments at 12; IDCMA Comments at 34; IBM Comments at 6.

694 CompuServe Comments at 18-24; Tymnet Comments at 42-43.

695 NYNEX Reply at 31. However, as noted supra para. 238, it defines "cost-based" pricing to include components for "price uniformity and stability" and "business risks" above a "reasonable rate of return". NYNEX Reply at 31 n.44.

696 Id. at 31-32.

normal regulatory procedures. It states that it is premature to judge the pricing of these elements before such filings are made.[697]

298. SWBT replies that ESPs should realize that BOCs must be permitted to earn some contribution on their ONA services if ONA is to be successful. It states that such contribution provides an incentive for a BOC to develop new services, allowing for recovery of common costs and compensation for additional risk, in addition to directly assigned costs.[698] SWBT contends that it is best to avoid a rigid "cost-based" pricing approach, and allow the BOCs to price using incremental costs as a "floor" and permitting the market to decide the levels of contribution to overhead and the rates of return that should be included in service prices.[699] SWBT asserts that state regulators want to encourage the growth of the enhanced services market to benefit state economies and will assure that rates for ONA services are set accordingly. States are also aware of the risks to local exchange customers if prices are set below economic costs, according to SWBT.[700]

299. SWBT responds to Tymnet's criticism of the markups on certain of its proposed services by noting that the examples chosen by Tymnet (Hunt Groups) are not generally representatative of ONA services. SWBT states that the markups will be much less for the higher priced services which will have a much greater impact on the ESP's bottom line, e.g., access links. It adds that the differences between incremental costs and prices will be consistent with accepted contribution levels for like services approved by state public utility commissions.[701] SWBT adds that use of contribution with an incremental cost approach does not conflict with FDC principles because FDC is designed to provide a contribution to overhead, over and above what pure incremental cost would provide.[702]

300. BellSouth replies that to the extent that any of the commenters are arguing about the "strategic" pricing of state rates, they should take their arguments to the appropriate state commission. BellSouth contends that even as to interstate rates, the appropriate forum for resolution of strategic pricing issues is not the ONA proceeding, but the

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697 Pactel Reply at 26.

698 SWBT Reply at 34-35.

699 Id. at 36.

700 Id. at 37-38.

701 Id. at 41.

702 Id. at 39-40.

tariff review process.[703] US West concurs and states that pricing and costing of BSEs should be left to the regulatory jurisdiction with authority over the service.[704] US West states that, subject to the concurrence of the appropriate regulator, it intends to apply the following principles: ONA services should be priced to (1) make a reasonable profit for the BOC; (2) maximize network usage by a broad array of users; and (3) conform to the cost and other regulatory standards of the filing jurisdiction.[705]

Access Charge Exemption

301. Some parties express concern over the effect of the BOC tariffing proposals on the ESP "exemption" from access charges.[706] CompuServe, IIA, and Telenet describe the BOC proposals as a "back door" means of imposing "access charges" on ESPs,[707] apparently meaning that some BOC plans would require ESPs to take BSAs priced at levels that are similar to federal access rates in order to obtain BSEs. Telenet and other ESPs particularly object to imposition of the carrier common line charge on ESPs.[708] ADAPSO contends that nothing in the Computer III decisions permits the BOCs to disregard the current access charge rules by eliminating the ESP exemption.[709] AICC complains of the lack of specificity of the NYNEX plan with regard to the ESP exemption.[710] However, NTCA believes that the "ESP exemption" should be terminated with the introduction of ONA plans.[711]

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703 BellSouth Reply at 35-36 & n. 34.

704 US West Reply at 69-70.

705 Id. at 70.

706 See, e.g., ADAPSO Comments at 37-38, 57-58; AICC- NYNEX Comments at 7; AICC-SWB Comments at 7; AICC-Bell South Comments at 7; AICC Reply at 10-11; ADCU Comments at 30 n. 47; DEC Comments at 11-12.

707 CompuServe Comments at 22-24; IIA Comments at 14-15; Telenet Comments at 45 n. 38.

708 Telenet Comments at 45 n. 38. See also CompuServe Comments at 20, 22-24; IIA Comments at 20; ADCU Comments at 38, 39.

709 ADAPSO Comments at 37-38.

710 AICC-NYNEX Comments at 7.

711 NTCA Reply Comments at 5.

b. Use Restrictions

(i) Availability of Existing Services

302. At present, ESPs can obtain switched access in BellSouth's territory by using predominantly flat-rated local business lines.[712] BellSouth's plan would require ESPs to take access under a special ESP tariff with rates including usage-sensitive charges.[713]

301. Various parties oppose BellSouth's proposed restriction as a matter of policy, contending that existing services should continue to be available to ONA users.[714] Telenet urges the continued availability of various types of business lines for ESP use, whether or not an ESP subscribes to a particular BSA or BSE.[715] New York, NTIA, and others believe that use

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712 BellSouth Reply at 64 n.72.

713 BellSouth Plan, Attachment Q, § 32.2F. Under BellSouth's plan, an ESP would be required to purchase: (1) an ESP access link covering facilities from the network interface on the ESP premises to the ESP's serving wire center (SWC); (2) features/functions, including a basic interconnection and basic concentration function, covering capabilities located at the SWC and/or at other SWCs; and (3) transport covering transport of calls within the ESP's SWC or between the ESP SWC and the subscriber's SWC, including interoffice trunking. BellSouth would apply a nonrecurring charge and distance-sensitive pricing to the access link element, a nonrecurring charge and a monthly rate for features and functions, and usage-sensitive charges for transport. Id. at §§ A32.5.B, A32.8.1, A32.8.2, A32.8.3. The rates for Transport/Usage are based on type (e.g., circuit switched, packet), distance, and/or duration (e.g., messages, minutes).

714 See, e.g., EDS Reply at 6. Cf. NARUC Comments, March, 1988 Resolution, Appendix at 2 ("BSA and BSE offerings should not adversely affect the price or availability of existing services nor should [they] justify withdrawal of existing services"), Joint Parties Comments at 4 (implementation of ONA should not harm users of existing services through rate increases or elimination of service options); CONAP Reply at 14; (advocating continued availability of existing tariffed services); CBEMA Comments at 42 (ONA implementation should not affect the availability of existing services); Dun & Bradstreet Comments at 7, 39-40 (advocating NYNEX approach of using existing tariffs to implement ONA so that no end user's capability to take existing services is changed).

715 Telenet Comments at 46.

restrictions on ONA services are generally inappropriate, anticompetitive, and discriminatory.[716] NTIA contends that users of existing tariffs must not be harmed by the introduction of ONA services that those users do not wish to use.[717] AICC-BellSouth, Dun and Bradstreet, and Tymnet argue that longstanding Commission policy against use restrictions compels rejection of provisions such as BellSouth's as being unreasonably discriminatory.[718]

303. In response to BellSouth's claim that such restrictions are necessary to avoid tariff shopping, UCC/OC states that if BellSouth were to unbundle thoroughly its basic services, the likelihood of tariff shopping would diminish.[719] ADAPSO states that BellSouth's arguments for restrictions are insufficient under this Commission's guidelines and ignore the competitive concerns underlying the decision to prohibit restrictions.[720] US Sprint questions whether tariff shopping incentives would indeed exist under BellSouth's pricing strategy and whether BellSouth would suffer any revenue losses absent the proposed restrictions.[721] ADAPSO contends that use restrictions such as BellSouth's are unworkable, since, as a practical matter, the BOCs are unable to distingish ESPs from other users. ADAPSO and others note that BOCs such as BellSouth have proposed use restrictions on their own initiative, and that these restrictions are not state policy.[722] ADAPSO thus contends that there is no need for this Commission to reach the question of preemption of state regulatory authority concerning such a restriction. It states that we need only conclude that such restrictions

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716 New York Reply at 8; NTIA Comments at 31. ADAPSO Comments at 44-46. See also AICC-BellSouth Comments at 8-10; ATSI Comments at 24-28; Tymnet Comments at 43-48; MCI Comments at 32-34.

717 NTIA Comments at 31. See also Joint Parties Comments at 4 (implementation of ONA Plans should not harm users of existing services through rate increases or the elimination of service options).

718 AICC-Bell South Comments at 8-10; Dun & Bradstreet Comments at 24-26; Tymnet Comments at 43-48.

719 UCC/OC Comments at 10-11.

720 ADAPSO Comments at 44-45.

721 US Sprint Comments at 14-16.

722 ADAPSO Comments at 44-46; Tymnet Comments at 46-47; US Sprint Comments at 16. Cf. Dun & Bradstreet Comments at 25 (any company seeking to impose user restrictions should bear a heavy burden to show their reasonableness, particularly if such restrictions are not state-imposed).

are inconsistent with federal policy, and absent any countervailing state interest, should not be permitted.[723]

(ii) ESP-Only Tariffs

304. A large number of parties oppose restrictions proposed in the BellSouth and SWBT plans to limit the availability of BSEs to ESPs.[724] BellSouth states that it proposes such restrictions, at least in part, to avoid arbitrage problems.[725] SWBT states that it hopes to avoid such restrictions, but may have to impose them because of potential arbitrage problems, if its proposed prices for ONA services are not accepted by state commissions.[726]

305. A large number of parties argue that such restrictions violate Computer III policy objectives.[727] ATSI relies on the Phase I Further Reconsideration in arguing that such restrictions result in cross-subsidization, price discrimination and market segmentation, leading to impediments to competition and reduced consumer welfare.[728] Dun & Bradstreet states that any company seeking to impose restrictions should bear a very heavy burden to show that the restriction is reasonable, particularly if the restriction is not state-imposed.[729] Dun & Bradstreet adds that the fact that a state may impose use restrictions has no effect on our power to continue the separate subsidiary requirement if the restriction is unreasonable.[730] ATSI and CBEMA believe that this Commission should adhere to our requirement of full and detailed justifications for use

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723 ADAPSO Comments at 44-46.

724 See, e.g., id. at 57-58, 44-45. Commenters also attack US West's plan to continue existing use restrictions for basic access arrangements. See, e.g., IIA Comments at 15-16.

725 BellSouth Plan at 69-70.

726 SWBT Plan at 94.

727 See, e.g., ADCU Comments at 47-49; AT&T Comments at 4-9; IBM Comments at 9-10; Tymnet Comments at 43-48.

728 ATSI Comments at 28.

729 Dun & Bradstreet Comments at 25.

730 Id. at 25.

restrictions on ONA services that are proposed for state tariffs.[731] For example, TCA objects that, under the BellSouth and SWBT plans, end users will not be able to purchase BSEs at all but will have to make do with CNSs.[732]

306. Florida and Noam, however, argue that use restrictions may be appropriate in some cases.[733] Florida asserts that use restrictions are most likely to be appropriate if there is a disparity between bundled and unbundled rates, and inconsistencies exist because of historic practices. In its view, each state is in the best position to decide on the propriety of such restrictions. Noam states that the decision to make ONA available to all users, not merely ESPs, could further blur the distinction between private and public networks, a result that Noam describes as not "necessarily negative" if such a blurred distinction would lead to substantial technological innovation and cost efficiencies and support basic service for the poor.[734]

(iii) Resale Restrictions

307. Most of the plans are silent on the issue of resale restrictions for ONA services tariffed at the state level. US West states, however, that while it imposes no resale restrictions on BSEs, restrictions on underlying access arrangements will apply.[735] Pactel states that it will not permit resale for all basic services. It will, however, consider making certain services, e.g., Call Forwarding on Busy Line/Don't Answer and Message Waiting Indicator, available for resale.[736]

308. Commenters express concerns about such proposed resale restrictions.[737] For example, Arizona states that US West's restriction of

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731 ATSI Comments at 30-31, 46; CBEMA Comments at 42. See also Hatfield Reply at 11; IIA Comments at 16. Cf. TCA Comments at 14-15 (Commission should require full and detailed justifications from SWB and BellSouth before approving their tariffs).

732 TCA Comments at 14.

733 Florida Comments at 4-5; Noam Comments at 8-9.

734 Noam Comments at 8-9.

735 US West Plan at 361.

736 Pactel Plan at 40.

737 See, e.g., Arizona Comments at 8; ALC Comments at 12-13 & nn. 27-29; MCI Comments at 33-34; MCI Reply at 17.

resale of access to BSEs, while perhaps appropriate in some cases, could unreasonably prohibit entities such as shared tenant service providers from also acting as ESPs.[738] ALC believes that all ONA features must be available for resale without limitation to both ESPs and IXCs on the same terms and conditions, and at the same rates, as those applied to the BOCs' ESP services. ALC states that if this Commission permits tariffs limiting ONA features to ESP providers, IXCs must be permitted to take ONA services at ESP rates, if the IXCs verify that they will be reselling such services exclusively for use by ESP providers.[739] ALC particularly objects to SWBT's prohibition of resale of CNSs by either ESPs or IXCs.[740]

3. Discussion

309. In reviewing the structures that BOCs propose for the tariffing of ONA services at the state level, we are sensitive both to the states' jurisdiction over intrastate basic services and to the need for meaningful implementation of our federal ONA policies. We are rejecting proposals that we require all ONA services to be offered exclusively in federal tariffs. We have sought to limit our actions concerning the BOCs' plans for such services to avoid intruding on state regulatory interests. At the same time, we have concluded that the actions we take in this order are necessary to safeguard our federal interests in an effective and efficient implementation of ONA that is consistent with the goals we established when we adopted ONA as the regulatory framework for the BOCs' participation in the enhanced services industry.

310. A number of parties suggest various bases for an assertion of preemptive jurisdiction over BOC plans for state-tariffed ONA services. Commenters note that such services handle substantial amounts of interstate traffic, so that, for example, under the "contamination doctrine," federal authority should govern if use of the ONA service cannot be measured.[741] Others contend that preemption may be necessary to ensure the realization of federal ONA objectives, and appear to suggest that we could so preempt because ONA services are inseverable for jurisdictional purposes.[742] Some commenters, in supporting a broad exercise of our jurisdiction, emphasize generally the

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738 Arizona Comments at 8.

739 ALC Comments at 1-2 & n. 1, 12-13 & n.27.

740 Id. at 13, nn. 28 & 29.

741 See, e.g., CONAP Comments at 70-71.

742 See, e.g., Tymnet Comments at 35-36.

importance of ONA as a federal policy as well as the critical role that state tariffing plays in execution of that policy.

311. We need not address the validity of these arguments because we do not take any preemptive actions in this order. We agree with Dun & Bradstreet that we have the authority to refrain from removing the structural separation requirements for the BOCs' enhanced service operations on the basis of the overall market environment that the BOCs propose to create, including their proposed tariffing structures for the ONA services on which enhanced services depend.[743] We established compliance with our ONA requirements as a precondition to complete removal of structural separation for the BOCs' enhanced service operations. We designed ONA, and the ONA plan approval process, to ensure nondiscrimination by the BOCs in providing basic services to competing ESPs without the need for service-by-service review of the BOCs' enhanced service offerings. We also intended ONA to promote an open, competitive, highly efficient enhanced services marketplace. If a BOC's ONA plan contains elements that are so inconsistent with ONA policies that they would jeopardize fulfillment of these goals, we cannot approve that plan. To do otherwise could create a discriminatory or inefficient environment for ESPs that rely on the BOC's ONA services.

312. Nevertheless, we focus our examination of the BOCs' proposed tariff structures narrowly and sharply on only those areas that are essential to achievement of our ONA goals. Principles of comity and a desire to keep the ONA process moving forward dictate this approach. The state commissions undoubtedly share our desire to develop more and better enhanced services to serve the needs of the public and to enhance the prosperity of every state and the nation. The considerations that have led us to adopt the ONA requirements are likely to lead state commissions to accept them. Neither the comments that state commissions have filed in this proceeding nor actions that state commissions have taken to date would lead us to expect a different result. As described below, we approve the fundamental tariff structure of all of the plans, but require several of the BOCs to file informational amendments further describing their proposals. We approve, without requiring such amendments, the specific tariff structures of only the Ameritech and the NYNEX plans.[744] Because most plans suffer from ambiguities, but do not contain provisions that are explicitly inconsistent with our requirements, we generally require clarifications, not revisions, of the proposed tariff structures of the other plans. One exception to this approach that we address

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743 Dun & Bradstreet Comments at 29.

744 This approval applies to the state tariffing aspects of these BOCs' plans. We have established separate requirements for federal tariffing of ONA services. See supra paras. 276-82.

in this Order[745] concerns BellSouth's proposed withdrawal of basic services that are currently offered to ESPs, a discrete aspect of its plan affecting service availability that we find unacceptable primarily for its disruptive effects on ESPs. We also require that BellSouth and SWBT provide further clarification and/or justification for certain other types of use restrictions in their tariffs.

a. Tariff Structure and Pricing

313. We have previously stated that unbundling[746] is "essential to give competing enhanced services providers an opportunity to design offerings that utilize network services in a flexible and economical manner."[747] We have also stated that the BOCs should implement CEI "at the lowest cost necessary to satisfy our equal access requirements" in order to encourage innovation and to insure that carriers do not incur unnecessary costs, so that ultimately the public will benefit from efficiently priced, affordable service.[748] Thus, unbundling and economical pricing are two hallmarks of an ideal tariff structure for ONA services. No ONA plan meets both of these objectives to the optimum degree. In light of other requirements we impose in this Order,[749] and of our limited jurisdiction over state services, we are adopting a flexible approach to BOC implementation of these objectives at the state level. For the reasons given below, we conclude as a substantive matter that, based on the information thus far provided, the state tariffing sections of the BOC plans generally appear to be acceptable for ONA purposes.

314. The tariff structures proposed by the BOCs appear to fall into two general categories. On the one hand, some BOCs propose to restrict BSE availability to BSAs, while at the same time repricing ONA services on what they describe as a more economical basis. The Ameritech plan is the clearest

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745 See infra paras. 321-22.

746 Many commenting parties describe the BOC proposals to offer BSEs only with BSAs or other specially tariffed forms of access as the "bundling" of BSEs with BSAs. We have adopted that usage in this section. We note, however, that some term other than "bundling" might be more precise. No BOC has proposed to bundle the prices of BSEs with BSAs or with each other. Some have declined to make BSEs available with service arrangements that might be used as a substitute for a BSA. That practice or restriction is described as "bundling" in the comments and this discussion.

747 Phase I Order, 104 FCC 2d at 1064.

748 Id. at 1046.

749 See infra paras. 321-22.

example of this approach and the one most consistent with ONA policies. On the other hand, some BOCs primarily propose unrestricted availability of BSEs with any existing services. The NYNEX plan is the clearest example of this approach.

315. Under Ameritech's proposal, rates for ONA services are based on our access charge principles, thus assuring us that these services are priced in an economically rational and efficient manner. While the Ameritech plan bundles BSEs with BSAs,[750] we find that this is not a fatal flaw in the overall context of its tariffing structure.[751] We note that under the Ameritech plan, ESPs are free to retain their existing basic services, which may be priced on a different basis than Ameritech's BSAs. Thus, ESPs have increased choice for basic services under the Ameritech approach, since they can take either ONA services priced on a cost basis consistent with what many parties agree to be a rational pricing aproach, or more limited existing service offerings with different prices. This combination of economical pricing and continued availability of existing basic services for ESPs is an acceptable balancing of our ONA policies, since under such conditions, the availability of optional basic services, priced in a reasonable fashion, increases sufficiently to justify approval of this aspect of a BOCs' ONA plan.

316. The BellSouth, Pactel, and SWBT plans appear to resemble this aspect of Ameritech's proposal in that they purportedly aim to improve pricing of ONA elements, but would not permit unrestricted availability of BSEs with existing access arrangements. There are, however, various uncertainties about each plan that require clarification. For example, while BellSouth's plan is not clear on its pricing strategy for BSEs, a BellSouth CEI filing has provided information on a proposed CEI tariff, which apparently would be a

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750 Some parties characterize such tariffing arrangements as "use restrictions" with respect to BSEs, since, they argue, BSEs can only be used with BSAs. We consider a "use restriction" somewhat differently, as a tariff term or condition that restricts a certain class of users from obtaining a tariffed service or from using it in a specified manner. The Ameritech plan would offer ONA services to any customer. Thus, there is no use restriction issue in this instance. BellSouth and SWBT indicate that, at least under certain circumstances, they may restrict their BSA/BSE tariffs to ESPs. This we do regard as a "use restriction," and we address this aspect of these plans infra at paras. 323-24.

751 Indeed,Ameritech argues that the bundled aspect of its tariff is an essential feature of its plan that permits it to offer BSEs on a cost basis. Many initial BSEs, it asserts, resemble generally available features that are priced well above cost. By restricting BSEs to BSAs, Ameritech will be able, it asserts, to lower the prices of BSEs below currently tariffed rates for comparable features.

precursor to its ONA tariff, that shows significant reductions in the prices of BSE-type features compared to the prices it now charges for similar features in its general tariffs.[752] This pricing approach, which appears similar in result to Ameritech's, could be desirable for ONA services for BOCs that restrict BSEs to particular BSAs. Although Pactel's plan is vague on this point, it also apparently intends some repricing as part of its offer of new access arrangements for ESPs.[753] SWBT's plan provides a great deal of information on its proposed tariffing, but in light of the requirements we have established for federal tariffing and SWBT's significant reliance on cross-referencing for the efficacy of its overall tariffing approach,[754] SWBT may well have to re-examine its tariffing proposal.[755] Accordingly, we require these BOCs to file informational amendments clarifying their plans by May 19, 1989.[756]

317. NYNEX's proposed tariff structure also satisfies the ONA requirements. The NYNEX plan is highly unbundled and unrestricted, since it proposes to make BSEs available with all technically compatible access arrangements, including existing state-tariffed business lines. This very broad unbundling is highly desirable. While NYNEX describes its intrastate

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752 See BellSouth Reply to Comments on its Plan for Comparably Efficient Interconnection for Voice Messaging Service, filed May 23, 1988, 18-22 & Table II, at 2, & Table III.

753 Pactel Reply at 28-29.

754 SWBT Plan at 84-90. Reliance on cross-referencing is also a feature of the other BOCs'plans (with the exception of Ameritech's), but it is most clearly an issue for the tariffing approach of SWBT. If any other BOC wishes to propose changes in its tariffing plans in light of actions we take in this order, it should include such changes in the amendments to be filed May 19, 1989.

755 In addition, while SWBT proposes an incremental cost approach for BSAs and BSEs, it also states that it will apply "equivalent pricing" to maintain a relationship between the prices of bundled and unbundled services. SWBT should clarify how these two approaches will work together. We do not, however, find that either approach provides grounds for withholding plan approval.

756 Our characterization of BOC plans as following either the Ameritech or NYNEX models is based on our understanding of somewhat ambiguous proposals. We do not intend by this characterization to limit a BOC from specifying with particularity a plan that follows a different approach that also complies with ONA objectives. We simply note that the Ameritech and NYNEX proposals are the clearest examples of satisfactory approaches among the plans.

ONA services as being priced on a "cost basis," its pricing approach apparently differs significantly from the pricing approach that we use in our access tariffs. However, we note that the highly unbundled nature of the NYNEX proposal gives an ESP an opportunity to combine BSEs with a wide variety of access arrangements that, as a practical matter, should permit ESPs to take ONA services on an economical and efficient basis. The US West and Bell Atlantic proposals appear to be similar to that of NYNEX, but are not sufficiently clear for us to determine definitively whether that is so. As stated above, ONA plans should be sufficiently clear to provide ESPs, other interested parties, and this Commission with adequate notice of the specifics of these BOCs' tariffing proposals. We therefore also require US West and Bell Atlantic to file informational amendments clarifying their tariffing approaches by May 19, 1989.

Access Charge Exemption

318. Finally, while some parties claim that the BOCs' state tariff proposals are an attempt to abolish the ESPs' exemption from federal access charges for interstate access, we believe that such arguments are misguided. Under the ESP exemption, ESPs are treated as end users for access charge purposes and therefore are permitted, although not required,[757] to take state access arrangements instead of interstate access.[758] We have not, however, attempted to preempt states from applying intrastate access charges, or any other intrastate charges to ESPs, when such service providers are using jurisdictionally intrastate basic services.[759] To the extent that the plans propose new access arrangements, the BOCs propose state tariff filings or revisions that do not implicate this Commission's access rules. Such proposed changes in state tariffs could occur separate and apart from ONA implementation. Notwithstanding such arguments, we preserve the exemption[760] for ESPs by approving the proposals of six of the BOCs that permit ESPs to continue to take state-tariffed access services now available to them and other "end users."[761] The only ONA plan that would restrict ESPs from taking

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757 First Data Resources, Inc., Memorandum Opinion and Order, Mimeo No. 4732 (released May 28, 1986).

758 See generally Northwestern Bell Tel. Co., Memorandum Opinion and Order, 2 FCC Rcd 5986 (1987) at 5986, para. 1; appeal pending sub nom. Northwestern Bell Tel. Co. v. FCC, No. 87-1745 (D.C. Cir.) (pet. for rev. filed Dec. 4, 1987).

759 Id. at 5989 n.24.

760 47 CFR Sections 69.2 (m), 69.5.

761 See supra paras. 309-312.

existing local access services is that of BellSouth, and we disapprove this aspect of its plan.[762] Thus, we ensure that ESPs will continue to be able to take local business lines, or other state-tariffed access arrangements, instead of federal access, in the same manner as other end users. This treatment of ESPs as end users fully preserves our current exemption. Moreover, as discussed above, we will examine in our upcoming rulemaking different ways in which the exemption could operate in conjunction with the federal tariffing of ONA services we require in this order.[763] Thus, our actions on the ONA plans foreclose them from being "backdoor" means of eliminating the current exemption.

319. Under the tariffing structure we approve today, ESPs will have an increased choice among new ONA services and other existing basic services, subject to the pricing policies of the states and this Commission. The tariffing structure that will exist after completion of our upcoming rulemaking on Part 69 and federal tariffing of ONA services -- full federal tariffing of interstate BSEs, the continued availability to ESPs of existing state-tariffed access arrangements, and state tariffing of intrastate ONA services -- will balance the competitive needs of ESPs, the concerns of states for all intrastate ratepayers, and our ONA and access charge policies, including the continued treatment of ESPs as end users for federal access charge purposes. Thus, the actions we take in this order ensure that ESPs can continue to take the basic services available to other parties classified as end users in our access charge rules.

320. We, of course, are not intruding on state determinations of the rates for jurisdictionally intrastate services. Thus, on the state side we do not require that such BSEs be both cost-based (as that term is used in federal ratemaking) and made available with local access lines.[764] We recognize that such a requirement would go beyond the current exemption and be a major intrusion into local ratemaking. As the record indicates, a number of initial BSEs are identical to, or close substitutes for, local exchange features that could be priced in some jurisdictions to generate a subsidy for services such as residential lines and, in some cases, business lines.[765]

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762 See infra paras. 321-22.

763 See supra paras. 276-286.

764 As discussed supra, no BOC proposes this approach. Those BOCs that propose to make BSEs available with local business lines do not propose cost-based pricing (as that term is used in federal ratemaking) for BSEs; those BOCs that propose such pricing of BSEs do not propose to provide them with local business lines.

765 See, e.g., BellSouth Plan at 69. See also New England Reply at 16-17

Thus, in such jurisdictions the BOCs could only couple cost-based, state-tariffed BSEs with local business lines by requiring ESPs to take such BSEs out of a special tariff, perhaps not available to other classes of customers, or by revamping their current rate structures for local exchange services. Neither of these approaches was contemplated in our ONA framework. We are reluctant to upset existing state subsidies in such jurisdictions and potentially cause severe impacts on the availability of low-cost universal service.

b. Use Restrictions

(i) Availability of Existing Services

321. BellSouth would restrict ESPs from continuing to use existing services, including business lines.[766] BellSouth has not adequately justified such a restriction for purposes of ONA plan approval,[767] and we believe that such a restriction is not justified under either our ONA policies or under our access tariff policy that treats ESPs as end users. It has not persuaded us that circumstances peculiar to its operations justify this departure both from our Computer III policies and from the norm followed by the other BOCs.

322. Moreover, as we have discussed previously, the development and implementation of ONA are major events in the communications industry, with particularly significant effects for ESPs. During this especially complex and dynamic transitional period for the enhanced services industry, withdrawal of service arrangements that ESPs, like other end users, currently use, even more than limitations on new ONA services, could have disruptive effects on the

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(states promote universal service through individual state-by-state policy decisions as to the relative level of local rates with respect to the rates for other telecommunications services). See generally Telenet Comments at 44 n. 37 (acknowledging Pactel's position that its business lines are priced below cost in California and expressing a willingness to pay full cost-based rates, provided that such increases were applied to all users). See also SWBT Reply at 40-41 (replying to criticism of its markups on certain BSEs) and 37 (state regulators are aware of risks to local exchange customers if prices are set below economic cost for ONA services).

766 We interpret general statements in the Bell Atlantic and Pactel plans, see, e.g., Bell Atlantic Plan at 62, Pactel Reply at 28-29, as permitting ESPs to continue to take existing services.

767 Our Computer III decisions require such a justification. Phase I Further Reconsideration, 3 FCC Rcd at 1144; Phase I Reconsideration, 2 FCC Rcd at 3051.

ESPs.[768] Such a result could seriously jeopardize achievement of the goals of ONA. Thus, we will not approve an ONA plan that restricts ESPs from obtaining service arrangements now available to them.[769]

(ii) ESP-Only Tariffs

323. Although the BellSouth plan proposes a special tariff available only to ESPs, SWBT's proposal regarding use restrictions is not clear. The practical effect of such use restrictions also is uncertain. We believe that by associating BSEs with specially tariffed BSAs, which both these parties propose, these BOCs can provide sufficient protection against the sort of arbitrage that they identify as their concern.[770] These BOCs provide no explanation of why their "bundled" tariffing proposals cannot satisfy these or any other legitimate concerns without imposing the additional and potentially anticompetitive burden of use restrictions on their ONA tariffs.[771]

324. Nevertheless, we will not withhold approval of a BOC's ONA plan if there are substantial reasons why such restrictions are necessary in a carrier's particular circumstances. Accordingly, when BellSouth and SWBT amend their plans on May 19, 1989, those carriers should either (i) delete such restrictions from their tariffs, or (ii) provide more complete

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768 See Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd 2631, 2632-33 (1988).

769 To the best of our knowledge, this problematic feature of the BellSouth plan has neither been incorporated into effective state tariffs, nor been affirmatively required by state regulatory authorities. Thus, as a practical matter, BellSouth would not have to alter any current tariffs to comply with this condition.

770 We recognize that IXCs often take intrastate access pursuant to special tariffs. As noted above, we require more extensive federal tariffing of BSEs in our access tariff structure. See supra Section IX.C. Pursuant to our general policies against use or customer restrictions, there will thus be no restrictions on IXCs obtaining BSEs with the interstate access services they normally purchase. The use restrictions referenced in the text apply principally to end users.

771 Applying the reasoning of our discussion of preexisting resale restrictions, below, we find that the preexisting, generally imposed intrastate use restrictions mentioned in the US West plan are permissable. See infra para. 325.

justifications for any such use restrictions, as required in the Phase I Reconsideration.[772]

(iii) Resale Restrictions

325. We, of course, have a strong federal policy against resale restrictions, which are a type of use restriction. All ONA services offered in interstate tariffs will be available for resale by any customer. The Phase I Reconsideration requires BOCs to justify such restrictions for their intrastate ONA services in order to assure us that any such restrictions do not violate our antidiscrimination principles for ONA.[773] We believe that preexisting, intrastate resale restrictions imposed on the general body of subscribers (i.e., restrictions that do not specifically apply to ESPs) pose little anticompetitive danger to the enhanced services marketplace. Thus, we find that the preexisting, generally applicable resale restrictions described in US West's plan are permissable. It is unclear whether Pactel plans to impose resale restrictions on ESPs in addition to or different from those generally applicable to other subscribers, and we require Pactel to clarify its intentions in its amendments of May 19, 1989.

E . Other Pricing Issues

1. Sample Tariffs

326. The Phase I Order requires the BOCs to file sample tariffs with their CEI plans, and extends all such CEI requirements to the ONA plans.[774]

a. The BOC Plans

327. Most BOCs submit few or no sample tariffs with their plans. Pactel and Ameritech submit no such tariffs. Both BellSouth and US West include some tariffs with their plans that do not contain illustrative rates. Bell Atlantic and NYNEX submit some existing tariffs. SWBT includes illustrative state tariffs with proposed rates and some cost support.

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772 2 FCC Rcd at 3051, para.111.

773 Id.

774 104 FCC 2d at 1055, para. 190; id. at 1066, para. 218 See also Phase I Reconsideration, 2 FCC Rcd at 3067 n. 218.

b. Positions of the Parties

328. Several parties object to the lack of pricing data in the BOC plans.[775] Tymnet, for example, notes that only SWBT has included rate information in its ONA plan and states that without such information, we will be unable to determine whether the BOCs are complying with ONA objectives. Tymnet states that the absence of rate information and the "disturbing" information about the cost policies that the BOCs intend to employ heightens concern that the BOCs are pursuing rate-setting policies that would adversely affect the ESP industry.[776] US Sprint states that ESPs cannot reasonably plan their services without such pricing detail.[777] ADAPSO states we should require the filing of illustrative tariffs.[778] AICC-Pactel and Hello request more detailed information about the costs underlying rates for ONA elements.[779] ALC states that recent legal precedent requires us to obtain this information.[780] New Jersey, however, does not agrees that sample tariffs are necessary.[781]

329. Several parties state that this Commission should undertake a review of ONA tariffs as part of the ONA plan approval process.[782] IIA states

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775 US Sprint Comments at 2, 35-36; ADT Comments at ii, 15 n.41; ANPA Comments at 24; ATSI Comments at vi, 25; IIA Comments at 17-23 & n.31; Telenet Comments at 29-32; Tymnet Comments at 20-22; DEC Comments at 10; ALA Comments at 3; Dun & Bradstreet Comments at 14; TCA Comments at 5; District of Columbia Comments at 12.

776 Tymnet Comments at 20-22.

777 US Sprint Reply at 9.

778 ADAPSO Comments at 58-59.

779 AICC-Pactel Comments at 7 (criticizing Pactel's failure to discuss pricing principles or how its underlying costs will be determined); Hello Comments at 18.

780 ALC Comments at 11-12 & n.25, citing MCI v. FCC, Nos. 86-1181 and 86-1248 (decided Mar. 28, 1988) (D.C. Cir. 1988) Cf. Dun & Bradstreet Comments at 29 (Commission must insure that interstate ONA tariff rates are based upon costs).

781 New Jersey Reply at 7.

782 See, e.g., API/Wells Fargo Comments at 8-9; IIA Comments at 8 & n. 30; Telenet Comments at 31-32 & n. 23.

that its members will be unable to participate effectively in the evaluation of ONA plans if pricing issues are left exclusively to federal and state tariff proceedings.[783] US Sprint believes that ONA rates should be investigated.[784] ALC states that this Commission must find that there is no discrimination between proposed ONA access arrangements and existing interstate services, including interstate access.[785] Telenet recommends a "preview" procedure in which the BOCS would file sample tariffs with full cost support well in advance of ONA implementation.[786] NTIA, however, states that issues concerning actual prices should be determined in the tariff process because debates over pricing will slow the ONA process down and would lead to inefficient consideration of actual prices twice; once in the ONA proceeding and once in the tariff review process.[787]

c. Discussion

330. SWBT has submitted informative sample ONA tariffs that are useful to both ESPs and this Commission to understanding BOC pricing policies under ONA. SWBT's plan provides a model for the type of tariff information that is sufficient for compliance with the ONA requirement that BOCs submit sample tariffs. We therefore require the BOCs to amend their plans on May 19, 1989 to include sample tariffs on the SWBT model.[788] We stress, however, that we will examine these sample tariffs only to assure that the BOCs are complying with ONA goals. We see no need to establish review mechanisms other than normal federal and state tariff processes to examine generally the rates and terms and conditions of tariffs for ONA services. Such mechanisms could be both redundant and burdensome. Any tariff revisions or filings related to ONA thus remain subject to the existing tariff review procedures on the state or federal level.

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783 IIA Comments at 18.

784 US Sprint Reply at 9, 15.

785 ALC Comments at 12.

786 Telenet Comments at 31-32 & n. 23.

787 NTIA Reply at 15.

788 If carriers intend to use existing tariffed arrangements to provide ONA, such carriers should identify existing arrangements that correlate with the BSAs or BSEs described in their plans.

2. CEI Pricing Requirements

331. The Phase I Order established pricing requirements for CEI and ONA that permitted rates for distance-sensitive transmission to be based on cost.[789] That order also required the BOCs to include an averaged Basic Interconnection Charge (BIC) and an averaged Basic Concentration Charge (BCC) in ONA tariffs. The BIC was designed to reflect charges for the interconnection facilities and basic services used by all ESPs, while the BCC reflects charges for the traffic concentration equipment located at the carrier's premises.[790] We stated that standard tariffed rates should apply to preexisting, conventional network services that ESPs may use in conjunction with certain offerings.[791] The Phase I Reconsideration did not alter this pricing framework, and stated that we would not require an ONA offering that is substantially identical to an existing service to be priced lower than that service simply for CEI/ONA purposes.[792] We encouraged the use of existing basic services for ONA as a means of expediting initial CEI/ONA deployment.[793] The Phase I Further Reconsideration noted that ONA services may be tariffed at the state level that do not precisely fit our CEI pricing requirements. As an example, it noted that "exchange" features, such as call forwarding or call waiting, often are tariffed with the states on a flat-rate, monthly basis. We found that there would be no BCC or distance-sensitive transmission charge associated with such features and that the existing averaged flat-rate charges for these features are equivalent to a BIC.

a. The BOC Plans

332. The BOCs generally attempt to relate the BIC and BCC to either their price parity proposals or to their use of existing services for ONA. NYNEX's price parity proposal would, it claims, eliminate the need for the BIC and the BCC, since, it argues, if the NYNEX enhanced service operation pays the same charges as the other ESPs for ONA services, this achieves the same result as averaging the interconnection charge, without the extra burden of calculating and billing the BIC. NYNEX also states that its proposal eliminates the need for the BCC. Because it will be charging equal rates for transmission to its own operations, there will be no need for a

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789 104 FCC 2d at 1048-49, paras. 173-76.

790 Id. at 1049-51, paras. 177-82.

791 Id. at 1052-53, paras. 183-86.

792 2 FCC Rcd at 3068 n. 261.

793 Id.

counterbalancing averaged concentration rate, according to NYNEX.[794] It also believes that the averaging requirement could unfairly advantage high-volume ESPs, including NYNEX, who use multiplexing arrangements.[795]

333. US West states that its market research and related cost analysis led it to conclude that the interconnection arrangements for ESPs would be no different than such arrangements already in place and available in existing tariff offerings.[796] Ameritech states that it includes the BIC in its unbundled BSE rate,[797] but does not discuss the BCC. Neither US West nor Pactel discuss compliance with the the BIC and the BCC. Both Pactel and Ameritech generally state, however, that their enhanced service operations will take service at tariffed rates available to ESPs.[798]

334. Bell Atlantic states that existing tariff rates are consistent with the BIC requirement. It states that those portions of the rates intended to recover interconnection costs are not facility-or technology-specific, so that customers are charged the same rates for comparable connections.[799] With respect to BCC requirements, Bell Atlantic states that local exchange switched service tariffs contain no separate rate element to recover central office based multiplexing costs. It states that these costs are included in existing service costs and are averaged into the dial tone line rate.[800]

335. SWBT does not discuss the BIC, but states that a BCC, represented by a multiplexing functionality alternative charge within its Feature/Function component, will apply for multiplexing or other traffic concentration equipment. It states that the charge will be averaged for all traffic concentration equipment located within an SWBT central office. SWBT

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794 NYNEX Plan at 92-93.

795 Id. at 93-94.

796 US West Plan at 369-70.

797 Ameritech Plan at 37.

798 Pactel Plan at 40; Ameritech Plan at 90.

799 Bell Atlantic Plan at 85.

800 Id. Bell Atlantic states that under one of its multiplexing options a customer can receive up to 4032 channels simultaneously, through a customer-specified premises interface, with traffic concentration in the central office as necessary. It says cost of this interface is embedded in the averaged local transport rate element so that all customers pay for the concentration on an averaged basis. Id. at 86.

states that separate averaged charges will apply according to defined levels of multiplexing.[801]

336. BellSouth will charge averaged prices for various types of BICs, and will charge the same rate to its enhanced service operations as it will to other ESPs.[802] BellSouth states that tariffed prices for BCCs may be based on technology, size, and demand. It states that it will price these elements on an averaged basis.[803]

b. Positions of the Parties

337. ADAPSO asserts that the BOC plans are ambiguous about compliance with these pricing requirements, and argues that we should enforce the requirements.[804] Some parties object to the lack in many BOC's plans of separate rate elements for the BCC and the BIC. Tymnet states that only BellSouth and SWBT comply with this requirement.[805] AICC and US Sprint also object to several aspects of the BOCs' plans.[806]

c. Discussion

338. To a large extent, the BOCs' proposed initial ONA services include many existing basic services or newly unbundled versions of such services. Consistent with our holding in the Phase I Further Reconsideration,[807] the state tariffs generally used for such services do not conflict with our CEI pricing requirements, and thus we need not address further the applicability of these requirements to such services. We note, for example, the flat rates for charged BSEs or CNSs like call forwarding, and for some access services like business lines, appear to include the BIC. In light of the BOCs' use of the ONA model, with its BSA and BSE categories,

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801 SWBT Plan at 99-100.

802 BellSouth Plan at 71.

803 Id. at 71-72. BellSouth defines BCCs as equipment used to combine two or more messages or transmissions on the same facility. Id. at 71.

804 ADAPSO Comments at vi, 55-59.

805 Tymnet Comments at 50-51; MCI Reply at 30.

806 See AICC-Bell Atlantic Comments at 7-10; AICC-Ameritech Comments at 10-11; AICC-NYNEX Comments at 11, 12-14 and n.9; AICC-BellSouth Comments at 10-12. See US Sprint Comments at 31-33.

807 See supra note 1.

the BIC, as an interconnection charge, would be associated with a BSA rather than a BSE. Most BOCs represent that the BIC, or an equivalent charge, is already included in their charges for BSAs or existing forms of access. Those BOCs that take such services for their enhanced service operations at the same tariffed rates paid by all other competitors -- that is, under a price parity regime -- thus do not conflict with our pricing requirements.[808] BellSouth, which does not propose price parity generally, nevertheless represents that it will charge its enhanced service operations the same BIC as it will charge other ESPs, thus satisfying this requirement.

339. We originally intended the BCC to compensate for BOC use of the "short wire" cost advantage and to complement our requirement that the BOCs minimize transport costs.[809] All of the BOCS except BellSouth propose to forego the short wire advantage and to employ price parity.[810] We thus do not find it necessary to require these BOCs to offer a BCC, provided that those BOCs apply price parity to concentration functions, and for example, charge their own operations generally tariffed rates for any concentration functions those BOCs employ. BellSouth, which does not propose price parity, must, as noted above, amend its plan to describe how it will minimize transmission costs. If it does not choose price parity, it must clarify how a BCC would apply.[811]

3. Detariffed ONA Services

a. Positions of the Parties

340. Several parties express concern that BOCs may not continue to offer on a non-discriminatory basis ONA services that are detariffed on state level.[812] NTIA suggests that such detariffed services should be compiled in an ONA appendix.[813] Tymnet suggests that the BOCs commit to

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808 3 FCC Rcd at 1148 n. 93.

809 Phase I Order, 104 FCC 2d at 1051, para 181.

810 The Pactel plan is subject to clarification in this regard. See supra para. 169.

811 As noted supra, paras. 281-82, in our upcoming notice of proposed rulemaking on Part 69 and ONA, we will consider whether the BCC and the BIC are necessary in light of any changes in Part 69 that occur.

812 NTIA Reply at 11-12 & nn. 12, 13, ATSI Comments at 31 n. f 1; Tymnet Comments at 56.

813 NTIA Reply at 11-12 &.nn. 12, 13.

providing price lists for such services.[814] ATSI suggests that the BOCs file a description of the circumstances under which BOCs will offer such services.[815]

b. Discussion

341. We have already required BOCs that propose to offer untariffed CEI services to file a description of the circumstances under which they will offer those services.[816] We believe that this requirement is sufficient for notifying us of charges in state regulatory practices that could affect our federal goals for ONA.[817]

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814 Tymnet Comments at 56.

815 ATSI Comments at 31. n. 71.

816 Phase I Reconsideration, 2 FCC Rcd at 3054, para. 136.

817 A few parties raise issues concerning the relationship between ONA and our Price Cap proceeding. See Telenet Reply at 11-12; ICA Comments at 7-8; CONAP Comments at 62-63. See also Policy and Rules Concerning Rates for Dominant Carriers, Further Notice of Proposed Rulemaking, 3 FCC Rcd 3195 (1988). NYNEX contends that any discussion of the relationship between ONA and price caps should occur in the price cap docket. NYNEX Reply at 42-43 n. 70. Since the Price Cap proceeding is pending before us, it would be premature at this time to decide the effect of a decision in that proceeding on ONA.

X. INITIAL DEPLOYMENT AND FUTURE EVOLUTION OF ONA SERVICES

A. Initial Deployment Schedules

1. ONA Requirements

342. The Phase I Reconsideration stated that we did not expect carriers to complete ONA implementation throughout their entire service areas within one year and that deployment of ONA services initially could be limited geographically.[818] However, we required each carrier to include in its ONA plan specific dates for the deployment of the initial ONA services throughout its geographic service area.[819] The Phase I Further Reconsideration modified that requirement to permit the BOCs to project only so far into the future as appears feasible and to supplement those projections with rolling updates.[820] By way of example, we noted that a BOC might be able to demonstrate that the market demand for a given type of ONA service is sufficiently unpredictable that its deployment should not be planned more than two or three years in advance.[821]

2. The BOC Plans

343. In projecting deployment schedules for their initial sets of ONA services, each BOC's ONA plan contains information on the availability of its initial BSEs and BSAs at one or more of three levels: wire center, market area, and system-wide.[822] Only one BOC's plan shows the percentage of

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818 Phase I Reconsideration, 2 FCC Rcd at 3055, para. 142.

819 Id. at para. 143.

820 Phase I Further Reconsideration, 3 FCC Rcd at 1145, paras. 78 and 82-84.

821 Id. at para. 84.

822 Some BOCs provide deployment at the end office level as well. See, e.g., Ameritech Plan, Appendix 8. For purposes of this discussion, a "wire center" is a building in which one or more local switching systems are installed. In the great majority of cases, a wire center contains only one switch, and is identical to an end office, but in some cases a wire center contains more than one switch, in which case each separate switch is described as an end office. See GTE Sprint Communications Corp. et al., Memorandum Opinion and Order, 2 FCC Rcd 4367 (1987) at 4367-4368, paras. 6-12, and 4369, n. 4. The BOCs use the term "market area" in different ways that all appear to imply a contiguous geographic area, whose boundaries are delineated by the BOC that serves it, that encompasses at least one standard metropolitan

access lines at all three levels to be served by its initial set of ONA services.[823] In addition, most of the BOCs refrain from projecting geographic deployment of their initial sets of ONA services beyond 1989, although two BOCs show planned deployment through 1991.[824]

344. Ameritech says that its initial ONA services will be available to more than 60 percent of the total access lines in its territory by the fourth quarter of 1989.[825] It further states that it will generally make those services available at wire centers throughout designated market areas,[826] and that it will make its ONA services available at every end office in those areas.[827] Ameritech says it recognizes that ESPs need to be able to market their services in flexible zones of their own choosing, rather than being tied to the functionality of particular, perhaps scattered, central offices. It asserts that it will tariff its ONA service offerings in well-defined market areas comprised of contiguous central offices, thus enabling ESPs to establish the widespread availability of enhanced services over entire deployment areas.[828] Ameritech projects that, by the fourth quarter of 1989, its baseline generic software packages[829] will serve approximately 97.6 percent of

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statistical area (SMSA) (or, in the case of densely populated states, one consolidated statistical area (CSA)), as defined by the U.S. Bureau of the Census. The "market area" may not necessarily encompass an entire local access and transport area (LATA). "System-wide" means the entire territory served by one BOC.

823 See Ameritech Plan at 65-66.

824 Bell Atlantic Plan at 54 et seq., Figure 10; Pactel Plan at 35 and Appendix C.

825 Ameritech Plan at 65-66; Ameritech Reply at 6, 42.

826 Ameritech Reply at 6, 42; Ameritech Plan at 66. Ameritech designates the market areas simply by naming them, e.g., "Chicago, Cleveland, Columbus," etc.; it does not indicate whether it is describing municipalities, SMSAs, LATAs, or other geographic territories. Ameritech Plan at 65.

827 Id., Appendix 8.

828 Id. at 42.

829 Most telephone switching systems manufactured in recent years are controlled by generic software packages, known in the trade as "generics." The types of telecommunications functions that a switch can provide are dependent not only on the switch hardware but also on the generic, which is analogous to the operating system software of a personal computer in combination with certain important applications programs, such as a word processing package and

the total access lines in its primary deployment areas, 96.6 percent of the total access lines in its secondary deployment areas, and 100 percent of the total access lines in its rural deployment areas.[830] Ameritech states that where it does not install circuit switched ONA services and CNSs at the switching office nearest a customer, it will make them available through tariffed networking arrangements, such as foreign exchange service. By that means it proposes to deploy, or otherwise make available, the ONA service elements described in its plan throughout 19 market areas by September 1, 1989.[831] The 19 areas appear to represent a cross-section of Ameritech's territory, including six major metropolitan areas,[832] eight medium-sized metropolitan areas,[833] and five rural areas.[834]

345. Bell Atlantic states that the "vast majority" of its access lines -- 78 percent -- are located in 12 densely populated metropolitan areas, and that it will make its initial ONA services available in all of those areas by the end of 1989.[835] It says that 85 percent of the access lines in those areas are currently served by switching systems that, when equipped with the necessary features, are capable of supporting those ONA services.[836] Bell

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a spreadsheet. Installation of new or upgraded generics typically require relatively long lead times, though not as long as the installation of a new switch. Less lead time is required for the installation of optional "feature packages," although the BOCs often choose feature packages when they schedule generic software upgrades. A feature package, which adds features to an existing generic, is analogous to a graphics package for a personal computer, in that it might involve the installation of optional hardware as well as software. See Pactel Plan, Appendix B at 1, Appendix C at ii-iii.

830 Ameritech Plan at 66.

831 Ameritech Reply at 6.

832 Chicago, Cleveland, Columbus, Detroit, Indianapolis, and Milwaukee. Id. at 65.

833 Appleton, Wisconsin; Champaign, Illinois; Dayton, Ohio; Grand Rapids and Kalamazoo, Michigan; Madison, Wisconsin; South Bend, Indiana; and Springfield, Illinois. Id.

834 Crawfordsville, Indiana; Ironton, Ohio; River Falls, Wisconsin; Sterling, Illinois; and Traverse City, Michigan. Id.

835 Bell Atlantic Plan at 46. Bell Atlantic does not state whether "metropolitan area" corresponds to an SMSA or CSA.

836 Id. at 47.

Atlantic states that its initial set of ONA services are either available today or will be made available by the end of 1989 with the deployment of currently scheduled generics and associated hardware.[837] Its plan shows, for each of the 12 metropolitan areas, the percentage of access lines for which each ONA service in its initial set will be available in February 1989, and the ends of the years 1989, 1990, and 1991.[838] Bell Atlantic does not show the percentages of its subscriber lines in its entire system that will have access to each ONA service in 1989, 1990, and 1991, and does not provide deployment information for individual switching offices, stating that it will provide "wire center-specific" projections following approval of its plan.[839]

346. NYNEX provides a list of wire centers at which it will make its initial set of ONA services available,[840] but it does not indicate the percentages of its access lines that will be served by those wire centers on a system-wide or market-area basis.[841] NYNEX states that certain of its ONA services are primarily oriented toward business users, and will thus be offered mainly at wire centers serving business customers, while other ONA services can more appropriately be offered at wire centers in residential neighborhoods.[842] It implies, without stating directly, that its initial ONA services will be available within one year of its plan's approval[843] or by September 1989.[844]

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837 Id.

838 Id. at 54 et seq., Figure 10.

839 Bell Atlantic Plan at 47.

840 NYNEX Plan at 62-63; Appendix G.

841 NYNEX states generally that "[t]hese 19 new ONA services will be made available initially in geographic areas which provide access to major market areas of the NYNEX territory." NYNEX Plan at 63. It defines "major market areas" as the urban cores around which the NYNEX LATAs are designated. Id. at 61 n. *.

842 Id.

843 Id. at i, 30 n. *, and 47.

844 Id. at 50, 51-52, 53, and 54-55. NYNEX further states that a list of locations where it guarantees the availability of ONA service offerings can only be provided in the tariff fillings that accompany the introduction of a particular product. Id. at 62-63.

347. SWBT says that it will make its initial set of ONA services available, within one year after its plan is approved, in 12 metropolitan areas that contain 80 percent of the population in its territory.[845] According to SWBT, not all of its initial set of ONA services will be available initially throughout each of those 12 market areas, but the "great majority" of those services will be available throughout most of those areas. In addition, it says that it will make many of its ONA services available in smaller communities at the same time, and that it will continue to expand ONA services into smaller communities as conditions warrant.[846] For each ONA service, SWBT lists projected 1989 availability by wire center.[847] It provides a list of the three-digit number prefixes associated with each wire center, and a map showing the geographic area served.[848]

348. Pactel provides a detailed schedule of switch and generic software deployments through the end of 1991, along with a chart that shows the relationship between ONA services, switch types, and software generics, but, like NYNEX, it does not provide any summary statistics on the percentages of its access lines that will be served by the new capabilities, either on a system-wide or on a market-area basis.[849]

349. US West's description of its deployment plans is somewhat ambiguous. It states that "the availability" -- which it implies, but does not explicitly state, means the availability of its initial set of ONA services --will "approach 100 percent" in the "free" calling areas of its "major cities."[850] However, US West does not define a "major" city. US West provides a chart that shows the availability of each of its initial ONA services by switch type and generic software package.[851] Although US West suggests that the reader cross-reference a separate appendix to determine deployment schedules, that appendix shows switch deployments only, with no

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845 SWBT Plan at 106-107.

846 Id. at 107.

847 SWBT Plan, Appendix 13.

848 Id.

849 Pactel Plan at 35 and Appendix C.

850 US West Plan at 56. Unlike Bell Atlantic, which speaks of "metropolitan areas," US West does not state what percentage of its served population falls within its cities, nor does it further quantify the percentage of served lines that will "approach 100 percent."

851 Id., Appendix M.

indication of generic software installations planned for those switches.[852] US West states that, for purposes of simplification, the reader can assume that access lines served by certain switch types, which it enumerates, can be used to assess general availability of ONA services because those switch types will be able to offer "most" of its ONA services by September 1, 1989.[853] However, it adds that inferences drawn from that process would be "somewhat conservative" because other switch types can offer some, but not all, of those ONA services.[854]

350. BellSouth provides illustrative ONA service deployment projections for four metropolitan areas and nine rural areas,[855] but it contends that it is incapable of making such projections for its entire system more than six months in advance.[856] For the four metropolitan areas, it provides weighted estimates of ONA service availabilities extending from January 1988 until the beginning of 1992.[857]

3. Positions of the Parties

351. Commenters claim some BOCs' plans on initial deployment of ONA services do not provide adequate information. Some parties also express concern over the rate at which BOCs propose to deploy their services through the end of 1989.

352. Certain parties contend that some of the BOCs are not projecting their deployment schedules far enough into the future. For example, Telenet expresses dissatisfaction that BOCs, other than Bell Atlantic, BellSouth, and Pactel, do not provide post-September 1989 deployment data for their initial ONA services. Telenet argues that this "what you see is

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852 Id., Appendix L. This appendix lists the number of access lines served by each type of switch by "market area," which US West defines as a larger center of population within each state and LATA that (a) generally has an access tandem and local tandem switch and (b) includes smaller communities not within "free" calling areas that are "associated" with the larger population center. Id., Appendix L at 1, n. *.

853 Id. at 55-56.

854 Id. at 56.

855 BellSouth Plan, Appendix P.

856 Id. at 43.

857 Id., Appendix P at 3.

what you get" approach falls far short of meeting this Commission's directives.[858] MCI claims that the BOCs have provided almost no information on how or when they will make their initial sets of ONA capabilities more widely available, despite the fact that the BOCs operate on multi-year planning cycles.[859] IIA also claims that the BOCs engage in multi-year, long-range planning activities, and it argues that the BOCs are keeping these processes "opaque" to other firms, which, it says, cannot realistically expect to influence them.[860]

353. A number of parties complain about the level of detail provided by the BOCs in their initial deployment plans. For example, Tymnet contends that, while Ameritech, NYNEX, and SWBT provide sufficient detail about the availability of initial ONA services, Bell Atlantic, BellSouth, and US West provide little or no detail on the implementation of their ONA offerings.[861] It says that Pactel is providing detailed information about the capabilities of each switch type, but relatively little information about deployment.[862] Tymnet faults Bell Atlantic for failing to provide deployment data on an office-by-office basis.[863] BellSouth, it says, is asking us to approve its deployment plans "sight unseen" by arguing that it cannot provide any reliable projections in its plan.[864] Noting that US West offers assurances that availability of its initial ONA services will approach 100 percent in major cities, Tymnet says it is unfortunate that US West does not support its assertion with the locations of switches that will be available for use with its ONA services.[865]

354. ESC says that ESPs need deployment information for all serving central offices and tandem switches to allow them to select locations that

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858 Telenet Comments at 29.

859 MCI Reply at 27-28.

860 IIA Comments at 26-27.

861 Tymnet Comments at 27-29.

862 Id. at 27 n. *. As noted above, Appendix C of Pactel's Plan includes an office-by-office schedule of switch and generic software deployments through the end of 1991.

863 Tymnet Comments at 28.

864 Id. at 28.

865 Id. at 28-29.

can support the functionalities that ESPs require.[866] It cites Appendix 8 of Ameritech's plan as illustrating the type of information that it desires, but states that ESPs need additional detail, such as a discussion of the ONA services that designated software generics could potentially support, not just the services supported by "baseline" versions of those generics.[867] The District of Columbia argues that the BOC serving its area should be required to provide a wire-center-by-wire-center schedule showing when specified BSEs will be made available.[868] ADT, expressing a need for information about a BOC capability that it says is especially important to its industry, alarm services, urges that we require the BOCs to provide city-by-city estimates projecting the percentages of access lines on which they will be capable of providing derived channel multiplexing.[869]

355. Some commenters object to the rate of ONA deployment through BOCs' service areas and the geographic limitations in the BOCs' deployment plans. Dun & Bradstreet says that the schedules submitted by the BOCs show very large geographic gaps and argues that, if the BOCs are permitted sole control over implementation schedules, the BOCs will have an enormous opportunity and incentive to discriminate.[870] The fact that some ONA services will initially be made available only in portions of larger cities, based on so "random" a variable as the location of existing switching offices, could have a major adverse impact on ESP marketing, it says.[871] CONAP expresses the same concern, stating that a company cannot afford to offer a new product or service that is limited in availability based upon the "random assignment" of potential customers to telephone company end office switching machines.[872] DEC acknowledges that it would be unrealistic to expect universal deployment within one year after plan approval, but it recommends that we

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866 ESC Comments at 8.

867 Id.

868 District of Columbia Comments at 11.

869 Id. at 33.

870 Dun & Bradstreet Comments at 35-36. Dun & Bradstreet is apparently concerned that the BOCs will allow the business plans of their affiliated ESPs to drive the deployment of ONA services, while the needs of unaffiliated ESPs will receive less, or possibly even negative, attention from the BOCs.

871 Id. Dun & Bradstreet apparently means that the geographic areas served by particular switch types may be scattered in a way that bears no systematic relationship to the potential markets for enhanced services.

872 CONAP Comments at 42.

condition plan approval on the BOCs' submission of firm deployment schedules for expanding the geographic availability of the initial set of ONA services.[873] ATSI expresses a similar recognition that universal deployment may not be feasible within a year after plan approval,[874] but it says that this Commission should direct the BOCs to make ONA services universally available within a reasonable time after plan approval.[875] IIA argues that the limited geographic deployment of ONA services described in the plans will inhibit efforts by competing ESPs to develop nationwide services.[876] ICA contends that the Communications Act precludes this Commission from allowing the BOCs' perception of market demand to determine the geographic availability or the pricing of ONA. It argues that we are obligated to address the issues of whether, when, and at what cost rural areas will gain access to ONA services.[877] MCI says that the BOCs' failure to provide detailed schedules for the deployment of their initial sets of ONA services into additional geographic areas violates the ONA requirements.[878]

356. In reply, the BOCs generally defend the rate at which they are deploying ONA services, and endeavor to justify the amount of information that they provide in their plans. For example, Ameritech notes that Appendix 8 of its plan provides detailed deployment information for each central office located within its 19 initial deployment areas. It says that it will be providing periodic updates in the future.[879] Bell Atlantic says that it has not been able to provide deployment projections for each of its end offices because ESPs have failed to provide it with a description of their needs on any kind of geographic market basis.[880] BellSouth contends that inclusion of office-by-office scheduling projections in its plan would provide ESPs with unreliable information, because its current procedures for scheduling end office modifications do not permit provision of reliable information more than six months prior to the deployment of ONA services in any given

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873 DEC Comments at 15.

874 ATSI Comments at 40.

875 Id. at 42.

876 IIA Comments at 26.

877 ICA Comments at 9-10.

878 MCI Comments at 24.

879 Ameritech Reply at 44-45.

880 Bell Atlantic Reply at 18.

switch.[881] NYNEX claims to have submitted a deployment schedule that indicates on an office-by-office basis which ONA services will be available,[882] and it argues that universal deployment might not be appropriate, because it could burden ratepayers with services in areas where there is low demand.[883] Pactel claims that we did not require "full deployment," but rather an initial schedule, updated annually.[884] SWBT defends the absence of post-1989 deployment information in its plans by pointing to the level of detail that it provided for the period extending through the third quarter of 1989, including more than 1,500 pages of maps.[885] US West says that it will expand the geographic availability of its initial ONA services in response to market demand from ESPs, and that it will not discriminate in favor of its own ESP.[886]

4. Discussion

357. Taken as a whole, the BOC plans provide a substantial amount of useful information on the pace and scope of the initial deployment of ONA services. We recognize that the plans do not provide all of the information that ESPs have requested; but the development of ONA presents the BOCs with an unprecedented challenge, addressing, as we acknowledged in the Phase I Further Reconsideration, the needs of markets "that are more volatile and difficult to predict than the market for voice services," involving "a variety of market segments" that, unlike the relatively mature market for voice services, are "new and difficult to evaluate for scheduling purposes."[887] Some plans project the deployment of ONA services three or more years into the future; others provide detailed deployment information at the wire center level, and still others have organized their projections on a system-wide or metropolitan area scale that facilitates general evaluation. Nevertheless, while we appreciate the efforts of the BOCs to date, we find that each plan is inadequate in certain respects and that additional information of one kind or another from every BOC would be extremely valuable, both to the enhanced

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881 BellSouth Reply at 47-48.

882 NYNEX Reply at 66.

883 Id. at 63.

884 Pactel Reply at 23, citing Phase I Further Reconsideration, 3 FCC Rcd at 1066, para. 84.

885 SWBT Reply at 62.

886 US West Reply at 50.

887 Phase I Further Reconsideration, 3 FCC Rcd at 1145, paras. 82-83.

service industry in planning their service offerings and to this Commission in evaluating the BOC efforts in implementing ONA.

358. For example, we agree with commenters who state that the BOC plans that include only a one-year deployment schedule are inadequate. We believe that the benefits from requiring longer-term schedules outweigh the burden on the BOCs from making such information available. We note that two BOCs -- Pactel and Bell Atlantic -- have provided three-year projections for deployment of their initial ONA services, which strongly suggests that such projections would also be feasible for the other BOCs. As commenters note, and as some of the ONA plans themselves state, the BOCs routinely plan several years ahead for the deployment of hardware and software that will underlie basic services such as their ONA offerings.

359. Moreover, we believe that three-year projections provide a more representative early view of the BOCs' deployment plans than shorter projections can. Short-term projections do not address the possibility that one BOC might be willing to proceed rapidly through the end of 1989, but with little progress planned immediately thereafter, even though another BOC, proceeding at a slower pace, might actually intend to achieve a more widespread deployment by the end of three years. Three-year projections reflect the reality, which is recognized by almost all parties who address the issue, that universal availability of all ONA services cannot be achieved in one or two years. Three year plans are more useful than shorter-term plans in showing whether the BOCs are making reasonable progress in the deployment of ONA services.

360. While we have held open the possibility of imposing sanctions on carriers that fail to conform to the deployment schedules in their ONA plans,[888] we also clearly recognize that the BOCs' deployment plans can and should change as additional information becomes available about future demand for ONA services, particularly to serve new and volatile markets like those for many enhanced services.[889] We accordingly required the BOCs to update their deployment plans annually.[890] We understand that three-year plans will be subject to more revision than shorter plans. We also understand that some kinds of plans are more subject to change than others: the availability of a specific feature package might be more subject to revision than the deployment of generic software, and generic software would almost certainly be more subject to change than the planned deployment of switching

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888 Phase I Reconsideration at 3055, para. 143.

889 Phase I Further Reconsideration, 3 FCC Rcd at 1145, paras. 82-84.

890 Id. at para. 84.

hardware.[891] Thus, the standards of review we will employ in evaluating the BOCs' proposed schedules and their compliance with those schedules will consider these factors.

361. As noted above, the BOCs have variously provided their deployment projections at one or more of three levels -- wire centers, market areas, and entire systems. Projections for individual wire centers, and perhaps for switches within wire centers in some cases, appear to be useful to ESPs for business planning purposes, and we encourage the BOCs to provide ESPs with such information as far in advance as is reasonably feasible. However, because the record in this proceeding does not clearly indicate what kinds of information the ESPs need, or how far in advance they need it, we are not prepared to prescribe a detailed format for the BOCs to follow in filing deployment information at the wire center level. We believe that the IILC would be an appropriate forum at which the BOCs and the ESPs can further refine their analysis of this issue and, perhaps, reach agreement on uniform and mutually acceptable filing guidelines.[892]

362. To assess the overall merit of ONA deployment plans, this Commission needs deployment projections on a market-area and system-wide basis. System-wide projections provide an overview of a BOC's progress toward achieving a meaningful implementation of ONA, and data on metropolitan markets shows to what extent the BOC is providing those services in useful configurations.[893]

363. Accordingly, as a precondition to approval of the BOCs' ONA plans, we require each BOC to amend its plan, by May 19, 1989, to provide projections of the percentages of its access lines that will be capable of supporting each of its initial ONA services, both on a system-wide basis and for each of the geographic market areas in which it is deploying ONA services, on July 1 of 1990, 1991, and 1992.[894] We also require the BOCs to report the

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891 See supra note 829.

892 We will prescribe such guidelines if the BOCs and the ESPs fail to achieve a broadly accepted consensus on this issue within a reasonable period of time.

893 We particularly acknowledge Ameritech's recognition that undue scattering of ONA service functionalities can impede ESPs' ability to market their products. The steps that Ameritech has taken to make ONA services available over entire metropolitan areas should greatly increase the usefulness of its offerings to the public and to the enhanced services industry.

894 Because the BOCs' ONA plans differ, the nature and extent of supplementary information that we require of each BOC varies. We therefore attach, as Appendix A to this order, a description of the additional

results of their IILC discussions on the format of wire center deployment information when they file the above-mentioned amendment.[895]

364. We defer assessing the sufficiency of BOC deployment plans for their initial sets of ONA services. We will resolve that question after the BOCs file their projections in the form described above. While we do not require the "introduction of a massive and possibly inefficient new architecture in areas where it is neither necessary nor desirable,"[896] we caution the BOCs not to assume, without compelling evidence to the contrary, that large cities are the only places where market demand will support ONA services. We commend the efforts of those BOCs, like Ameritech and BellSouth, that appear to be deploying ONA services in a representative cross-section of communities, including smaller towns and cities. Such offerings can provide an opportunity to test the demand for ONA services in such areas, and to test the creativity of ESPs in meeting the needs of users outside of large cities.

B. ONA Evolution and Future ONA Services

1. ONA Requirements

365. The Phase I Order required the BOCs to specify procedures in their plans that will permit ESPs to request and receive new ONA services.[897] While we did not specify procedures the BOCs should follow, our requirement that BOCs describe those procedures followed a detailed explanation of the process that we envisioned for the development of initial ONA services. We stated that we expected the carriers to make such decisions with participation from the rest of the enhanced service industry because ESP input would be essential for network planning. We therefore urged the BOCs to meet with

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information that we require of each BOC. We also acknowledge the view expressed by NYNEX that some ONA services may be more appropriate for business uses than for residential applications, or vice versa. BOCs may augment their filings with statistics showing ONA availabilities by percentage of business access lines versus residential access lines, although we do not require them to do so.

895 See supra para. 206. In directing the BOCs to develop a format for announcing deployment information at the wire center level, we do not exclude the possibility that, in some cases, it might be appropriate and necessary to provide such information for individual switches within wire centers.

896 Phase I Reconsideration, 2 FCC Rcd at 3055, para. 142.

897 Phase I Order, 104 FCC 2d at 1066, para. 217.

ESPs in industry standards organizations or other forums, and to explain in their plans the procedures and industry participation that they use in developing ONA services.[898]

366. The Phase I Reconsideration stated that the implementation of initial BSEs is only a first step in ONA development. We required each BOC to include in its ONA plan a schedule for the phased introduction of further ONA capabilities after implementation of the initial set of ONA services.[899] We acknowledged in the Phase I Further Reconsideration that, in the case of certain ONA services, a BOC might be able to demonstrate that market demand is sufficiently unpredictable that its deployment should not be planned more than two or three years in advance.[900] However, we emphasized that we did not mean to imply that two or three years would be a sufficient and acceptable planning horizon for all types of ONA services or even for any one type of ONA service. We said BOCs must justify such scheduling limitations in their ONA plans.[901] After noting that the BOCs typically have well-defined schedules for switch replacements and facilities deployment that may extend as long as 10 years into the future, we concluded that these planning schedules may provide clear guidance for evaluating the feasibility of ONA deployment for a relatively long scheduling period.[902]

2. The BOC Plans

367. Most ONA plan sections devoted to future ONA services provide general, discursive analyses of BOC progress toward the implementation of sophisticated new technologies. Most BOCs do not identify any specific ONA services other than those that appear in their initial sets, nor do those BOCs describe on what terms they will offer service to ESPs through technologies more advanced than those existing technologies that their initial sets primarily reflect. Having generally avoided describing what their future ONA services will be, these BOCs naturally make no attempt to project future deployment schedules for such services.

368. The BOCs discuss CCS7 and ISDN at greater length than other new technologies. While recognizing the potential for synergy between those technologies, the BOCs do not suggest that the availability of either ISDN or

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898 Id.

899 Phase I Reconsideration, 2 FCC Rcd at 3055, para. 143.

900 Phase I Further Reconsideration, 3 FCC Rcd at 1145, para. 84.

901 Id. at 1149 n. 133.

902 Id. at 1145, para. 83.

CCS7 presupposes the availability of the other. While some BOCs appear to be pressing forward with early deployment of CCS7, others appear to place greater emphasis on ISDN, although certain BOCs apparently are preparing to offer both in the near future.[903]

a. CCS7

369. At least three BOCs include some ONA services based on CCS7 technology in their initial sets. Bell Atlantic offers at least seven BSEs in a CCS7-based feature package called Custom Local Area Signaling Services (CLASS). Most of these transmit calling parties' numbers to called parties or use such information to provide certain features at the called party's request.[904] Bell Atlantic projects the availability of CLASS services by percentage of access lines in each of its major market areas through 1991.[905] Pactel offers four CCS7-based CLASS features in its initial set of ONA services[906] and identifies 67 offices where it will be offering such services by the first quarter of 1990.[907] BellSouth also claims to have included some

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903 Compare Ameritech Plan at 114 (ISDN); Bell Atlantic Plan at 48-49 and 95 (ISDN and CCS7); Pactel Plan at 55 and Appendix B at 28, 34, 50, and 52 (ISDN and CCS7); BellSouth Plan at 90 (CCS7); NYNEX Plan at 119 n. * (CCS7); and SWBT Plan at 148 (CCS7).

904 Bell Atlantic Plan at 48-49. The features are Calling Number Identification, Call Block, Automatic Recall, Automatic Call Back, Central Office Trace, Selective Call Forwarding, and Distinctive Ringing. Id. In its reply comments, Bell Atlantic states that it is adding ONA services to its initial set but does not indicate which, if any, of them involve CCS7. Bell Atlantic Reply, Appendix A.

905 Bell Atlantic Plan at 54-53.

906 The ONA services are Calling Number Directory Number Delivery, Distinctive Ringing, Selective Call Forwarding, and Selective Call Rejection. Pactel Plan, Appendix B at 28, 34, 50, and 52.

907 Id., Appendix C at iii. It is noteworthy that Pactel reports plans to equip a number of its offices with generic software that is apparently several generations more advanced than the earliest generation that it shows supporting some CCS7-based CLASS features. For example, Pactel shows certain CLASS features being supported by BCS-23 software on the DS100 switch; it also shows BCS-24, BCS-25, BCS-26, and so on up to a BCS-32 generic software package that it says will be installed on December 31, 1990, at its 611 Folsom St. office in San Francisco. Id., Appendix C. However, Pactel does not indicate what, if any, features these later generations of software will support that the earlier generations will not support.

CCS7-based features in its initial ONA service set, but BellSouth does not identify those features in its discussion of network evolution.[908]

370. Other BOCs describe imminent or ongoing deployments of CCS7-based services, without including any in their initial ONA service sets. NYNEX, for example, says that it is already "well underway" in its initial deployment of CCS7. It is "in the process of deploying" signal transfer points[909] and a network of signal links as the backbone of its CCS7 network infrastructure. It says that it is initially equipping selected tandem switching nodes[910] to act as concentrators and that it is developing service applications that will rely on CCS7, such as BOC 800 Service, Operator Services, a tandem alternative for equal access from nonconforming offices, and a virtual private network capability. By deploying these capabilities at tandem locations, it claims, the broadest base of customers can gain access to these capabilities in the shortest possible time frame.[911] NYNEX studies are underway "at this time" to determine when and where CCS7 will be deployed at NYNEX local offices.[912] SWBT says that its initial implementation of CCS7 will be at the tandem switch level to support exchange and exchange access services, and that CCS7 is "currently being supported" for the implementation of 800 Data Base Service to facilitate equal access for 800 services. It says that implementation of 800 Data Base Service is scheduled for late fourth quarter 1988.[913] However, SWBT asserts that the exact timing and location of additional CCS7 implementations "is currently unknown."[914]

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908 BellSouth Plan at 90.

909 A "signal transfer point" is a signal relay center that handles and forwards telecommunications signals from one signaling link to another in a non-associated mode of operation, e.g., when the telephone company is transmitting voice signals and dialed number signals over separate pathways, as is the case with CCS7. See X.1 CCITT Red Book at 343 and 255 (1985 ed.)

910 A tandem node is a central office unit used primarily as an intermediate switching point for traffic between local central offices that are directly connected to it through trunk lines. The area served by a tandem office may consist of one or more communities or may include only a portion of a relatively large city. Many tandem offices also provide interconnection of multiple local offices with the interexchange network. 47 C.F.R. Part 36, App., at 731 (1987 ed.)

911 NYNEX Plan at 119 n. *.

912 Id.

913 SWBT Plan at 148.

914 Id.

b. ISDN

371. The BOCs generally ascribe a high level of unpredictability to the implementation of ISDN. Several contend that it is infeasible to provide a schedule of future deployments of ONA services that are based on ISDN, because ISDN standards are either not complete or offer alternative options for implementation. BOCs say that some vendors' ISDN designs are incompatible with each other.[915] Despite those difficulties, however, some BOCs are moving ahead with ISDN deployments, on at least a limited basis. SWBT includes one ISDN BSE in its initial set of ONA services: an interface that uses a Q.931 protocol to provide calling number identification.[916] Ameritech says that its first customer ISDN trial, with the McDonald's Corporation, began in 1986 and that "[a]dditional deployment is planned for 1988 and 1989."[917] Bell Atlantic says that it will "begin the introduction of ISDN during 1988 with several trials and commercial implementations."[918] The 1988 deployments will be in individual exchanges that Bell Atlantic describes as "ISDN islands." It expects to initiate trials interconnecting ISDN exchanges with CCS7 and 64 kilobit clear channel capabilities in 1989.[919] Pactel says that it is currently conducting trials using ISDN equipment from three different manufacturers, and anticipates making early offerings of ISDN to selective markets.[920]

372. Despite the difficulty of projecting when and where they will deploy ISDN, BOCs have engaged in discussions with ESPs on making certain aspects of ISDN available as ONA services. Pactel appears to have made the most extensive commitment to this kind of effort, by supporting initiatives for standards bodies to develop specifications to allow ESPs to gain "equal and direct access to ISDN D-channel data packets as an alternative to access through LEC packet switches."[921] Pactel's ONA plan includes an attachment,

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915 See, e.g., Bell Atlantic Reply at 20; BellSouth Plan at 90; SWBT Plan at 151.

916 SWBT Plan, Appendix 2B at 33.

917 Ameritech Plan at 114.

918 Bell Atlantic Plan at 95.

919 Id.

920 Pactel Plan at 55.

921 Id. at 56.

"ONA Discussion of Access to Data Packets on the ISDN Basic Rate D-Channel" (D-Channel Report) prepared by a Task Force whose members include Pactel, Hewlett-Packard, IBM, Telenet, and Tymnet.[922] The D-Channel report defines "direct access" as meaning that the customer's data packets will be routed to the service provider of the customer's choice without first traversing the LEC's X.25 packet function.[923] Ameritech says that it welcomes the opportunity to work with ESPs to enable customers to use the ISDN D-channel to transmit customer-generated signaling "regardless of customer line status condition,"[924] i.e., for user-to-user signaling that may not be related to call set-ups. SWBT offers a restrained endorsement of these efforts, stating that it "supports" allowing ESPs to access the ISDN D-channel for use in providing enhanced services, but that it has not yet seen a proposal that would both allow the access desired and, at the same time, protect SWBT's ability to switch customers' calls as customers direct.[925]

373. US West alludes to, but does not extensively discuss, a complex of new technologies that are not clearly identifiable with either CCS7 or ISDN. The evolving network, it says, will permit improved customer control of network capabilities through interfaces that provide proprietary control of certain reconfigurable services, provisioning, maintenance, and network management functions.[926]

3. Positions of the Parties

374. Commenting parties generally express dissatisfaction with the BOCs' reluctance to provide specific information about future ONA services that are not included in their initial ONA service offerings. IBM, for example, argues that we have made clear that the promise of ONA lies in the development of a new network "architecture" or "design" that will be hospitable to the competitive offering of enhanced services, but that the ONA plans focus instead on the pricing and availability of functions that the carriers already offer.[927] It asserts that the BOCs do not describe how they

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922 Id., Appendix H, Attachment A.

923 The customer makes this routing selection through a subscription-time election or on a call-by-call basis. Id. at 9. Pactel emphasizes that it does not support ESP access to D-channel signaling packets, which it says would pose major network integrity issues. Id., Appendix A at 87-88.

924 Ameritech Plan at 113.

925 SWBT Plan at 150.

926 US West Plan at 407.

927 IBM Comments at 14-15, citing Phase I Order, 104 FCC 2d at 1060 and

intend to develop and implement future network technologies, and it concludes that the BOCs' plans resemble mere collections of CEI plans.[928] IBM contends that we need to know not only what technologies the BOCs will deploy in the future, but also whether those technologies will be made available to ESPs "on a ubiquitous, technologically uniform, and nondiscriminatory basis."[929] IBM contends that the BOCs are presently developing, testing, and, in some cases, implementing a variety of technologically sophisticated network capabilities that promise greatly increased signaling capabilities and network intelligence based on the implementation of CCS7, ISDN, and Intelligent Network features. It claims that the ONA plans themselves demonstrate that the BOCs are capable of describing at least the initial features of the new network designs that the carriers proposed to implement.[930] As an example, IBM cites Pactel's submission, described above, of a possible network interface for giving ESPs equal access to the ISDN "D" channel.[931] IBM further notes that SWBT describes how it intends to implement an ISDN interface using a Q.931 protocol to provide calling number identification, even though it did not offer such a capability among its initial set of ONA services.[932] IBM concludes that the BOCs need not withhold such descriptions until they are actually ready to implement new network functions,[933] and it further argues that delay in submitting such descriptions could enable the BOCs to hide the proposed changes until they have already made their future network design decisions and implemented their new network technologies. If this happens, it would be too late to change those plans.[934]

375. Noam and Tymnet express similar concerns. Noam contends th the ONA plans are a step in the right direction, but largely consist

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1063.

928 IBM Comments at 16.

929 Id. at 17.

930 Id. at 18.

931 Id., citing Pactel ONA Plan at Appendix H.

932 Id., citing Southwestern Bell ONA Plan, Appendix 2B at 33. IBM appears to be mistaken in its impression that SWBT will not be providing this capability in its initial set of ONA services. See SWBT Plan at 56 and Appendix 2B at 33; SWBT Reply at 8.

933 IBM Comments at 18.

934 Id. at 20.

repackaged existing offerings.[935] Tymnet argues that none of the plans provides any specific information about ONA deployment after implementation of the initial set of ONA services and concludes that "[v]ague statements about future industry cooperation and market demand, do not provide any reassurance that the BOCs are committed to the future successful implementation of ONA."[936] Tymnet characterizes SWBT's proposal to provide calling party identification using Q.931 signaling as a useful offering that anticipates the introduction of new signaling systems, but it says that, with that one exception, the plans effectively deny its request for calling party identification.[937]

376. Most other commenters who explicitly address this issue focus on their need for specific information about the availability of ONA capabilities provided through ISDN, CCS7, and the Intelligent Network. MCI contends that the BOCs are excessively vague on their proposed treatment of CCS7 and ISDN ONA offerings.[938] ADAPSO claims that the majority of the BOCs have failed to make any real commitment to pursue the Commission's ONA objectives and standards in the development of ISDN or Intelligent Network/2.[939] CONAP says that the BOCs have discussed ISDN and CCS7 only in abstract terms, as elusive, future possibilities; it contends that if, for technological reasons, the BOCs cannot provide a true ONA, this Commission should not force a regulatory program on a network that cannot support it.[940] Similarly, ICA concludes that ONA depends in large part on the availability of CCS7 and argues that it would be premature to implement ONA until that technology is in place.[941] DEC commends the BOCs for having made "legitimate, good faith efforts ... given the practical limitations of time and technology," but urges us to provide "incentives" for the BOCs to commit themselves to the implementation of ISDN and Intelligent Network

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935 Noam Comments at 7.

936 Tymnet Comments at 29.

937 Id. at 64-65.

938 MCI Comments at 28-29.

939 ADAPSO Comments at 28.

940 CONAP Comments at 18 and 3.

941 ICA Comments at 15-16.

capabilities.[942] Dun and Bradstreet decries the insufficiency of information about future deployment of ISDN capabilities.[943]

377. Some parties express concern because requested ONA services are not included in the initial sets being proposed by the BOCs. For example, ANPA states that the plans substantially implement only five percent of the functionalities that are important for electronic publishing, and that the plans deny many requests for additional capabilities that would be useful to electronic publishers on the grounds that the necessary technology will not be in place until the BOCs install the next generation of equipment, including CCS7 and ISDN; yet, says ANPA, the ONA plans shed little light as to when those capabilities will be deployed.[944] Among many specific requests, the alarm industry expresses interest in derived channels that are compatible with ISDN,[945] and interexchange carriers contend that the BOCs should be moving more expeditiously to provide CCS7 for interexchange call set-ups.[946] NCR says that the BOCs have rebuffed almost all of its ten ONA service requests for diagnostic testing and network configuration tools on the ground that the necessary technology will not be in place by the end of 1989.[947] IDCMA also asks for customer-controlled network management capabilities of a kind that, it says, the BOCs have discussed in general terms for future deployment but have not included in their initial ONA service sets.[948] ATSI expresses concern because the BOCs initially will offer many proposed ONA services only on an intra-office basis and will not make any commitment to deploy the CCS7 systems necessary to make such services available on an interoffice basis.[949] Telenet argues that, while the BOCs' claimed inability to meet some requests by September 1989 may be justifiable, their unwillingness to look beyond that time period is not.[950]

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942 DEC Comments at 4 and 20.

943 Dun and Bradstreet Comments at 15-16.

944 ANPA Comments at 10 and 14-16.

945 ADT Comments at 37.

946 See, e.g., ALC Comments at 19.

947 NCR Comments at 2.

948 IDCMA Comments at 19.

949 ATSI Comments at 34.

950 Telenet Comments at 26.

4. Discussion

378. Virtually all parties to this proceeding, including both BOCs and ESPs, agree that ONA, if it is to be meaningful, must be an evolutionary process rather than a short-term, flash-cut "fix." Indeed, the parties agree that the most significant implementation of ONA will take place in the future when the BOCs deploy advanced technologies like CCS7, ISDN, and Intelligent Network/2. These new technologies, most parties contend, will provide both greater opportunities for unbundling and a richer set of features and capabilities that independent ESPs and BOCs alike can use in developing innovative and efficient enhanced services for the American public.

379. We agree with these assessments. While we attach considerable importance to the achievement of immediate goals, such as implementing initial ONA plans, lifting the Computer II structural separation restrictions, and encouraging BOC entry into the enhanced services marketplace under conditions that promote efficiency and prevent discrimination, we are also very concerned that the long-term procompetitive, proefficiency benefits of ONA not be lost by a narrow focus on short-term goals.

380. As we have noted earlier, the ONA plans clearly reflect considerable devotion of time, energy, creativity, and other resources in response to the challenge we put to the industry in the Computer III orders.[951] We commend the BOCs for their efforts in developing these plans, which, taken as a whole, represent a very positive step in the right direction. Nevertheless, we are disappointed with the lack of specific commitments and information on how, or in some cases even whether, ONA will be implemented through new network technologies and incorporated into the future network planning process. We acknowledge that there may be good reasons for this failure. The task of developing the ONA plans in the time frame we provided and according to the procedures we established (which required opportunities for extensive industry input) was no doubt a daunting one. It may well be that establishing initial ONA frameworks, procedures, and services was all that could possibly be accomplished by the time the plans had to be filed. Nevertheless, we conclude that long-term ONA implementation must be strengthened. We are providing some specific guidance to accomplish that result.

381. Three significant issues regarding new network technologies and future ONA services must be addressed in the amended BOC plans: (1) How will the advanced capabilities and functions available with new network

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951 Those plans are, of course, not perfect. This order provides the BOCs and other industry members with guidance for improving the plans, both by requiring specific amendments to the plans and by identifying particular issues requiring further inter-industry efforts.

technologies be used to offer ONA services? (2) What process will the BOCs employ to obtain input from ESPs on the development and deployment of new network technologies and related ONA services? (3) When and where will these future ONA services be made available?

a. How New Network Technologies Will Be Used to Offer ONA Services

382. The BOCs cite the technological limitations of their existing networks as the principal reason for not offering many ONA services requested by ESPs and others.[952] At least implicitly, these representations suggest that many of these BSEs could be made available when new network technologies are deployed. Nevertheless, the BOCs, with a few limited exceptions, do not describe how new network technologies will be used, or could be configured, to offer these services that have been requested; nor do the BOCs provide information on what new capabilities, whether specifically requested or not, will be available that could be useful in offering services to ESPs.

383. Even when it is difficult to project when and where new technologies will be made available, it is feasible for the BOCs to discuss with ESPs, and to describe to this Commission, how ONA services can be offered through those technologies. For example, the Pactel plan describes its efforts, apparently successful thus far, to develop a means of offering ESPs access to the ISDN D-channel. Rather than not addressing the technical potential for this service and announcing it, if at all, at some future date as a fait accomplit, Pactel has incorporated ESP concerns into its planning for ISDN and included in its ONA plan a description of how this service could be offered in a way ESPs would find valuable.[953] SWBT has demonstrated how a similar kind of creative approach to new network capabilities can accelerate a BOC's ability to meet the needs of ESPs by devising a means of delivering calling number identification before CCS7 is deployed.[954] Accordingly, in

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952 See supra para. 131 (87 percent of negative decisions on BSE requests attributable to technical limitations of current network).

953 While we recognize that Pactel has not yet determined the precise technical means by which it will provide unbundled access to the D-channel, we do not think this undermines the utility of its submission. To the contrary, we believe this example illustrates that the BOCs can provide, and ESPs will find useful, information on how new technologies can be deployed to offer new ONA services even before the BOCs' technical plans for the services have been fully developed.

954 SWBT's solution, included in its initial set of ONA services, is to translate calling number information into the Q.931 ISDN protocol. SWBT Reply at 9; SWBT Plan, Appendix 2B at 33.

the ONA plan amendments that the BOCs will be filing on May 19, 1989, we require each BOC to describe the ONA services that it views as being technically possible to offer based on its current understanding of CCS7, ISDN, and Intelligent Network technologies. If possible, the amended plan should describe how the BOC will organize and offer those ONA services to ESPs.

b. How BOCs Will Obtain ESP Input on Future Network Technologies and ONA Services

384. ONA is not just a set of particular unbundled services to be used in providing enhanced services. Rather, one important part of our ONA policies is to provide an opportunity for enhanced service providers and carriers, as well as other members of the communications industry, to work together in planning how basic communications networks can be designed in ways that promote an open, competitive, and efficient enhanced services marketplace. This planning process should play an important role in ensuring that new network technologies are, to the extent feasible, developed and deployed in ways that promote, rather than impede, competition. Our policy recognizes that in many situations open, pro-competitive network designs are no more difficult to develop or operate than closed, non-competitive ones -- provided the proper planning is done early in the process.

385. The interexchange services market may provide a useful comparison. Until recently the national network was designed in a way that precluded equal access to local exchange facilities by interexchange carriers other than AT&T. When competition in interexchange services became a national public policy, achievement of that policy goal was initially impaired by this local network design based on monopoly provision of the service. The consequent necessity of retrofitting many switching offices resulted in additional costs, which exceeded substantially the costs at which equal access could have been provided if it had been included in network switching equipment when first installed. We hope to prevent such problems from occurring when ESPs seek new ways of interconnecting with the BOC networks in the future. ONA, like equal access for interexchange carriers, can be achieved more efficiently if planning for it is incorporated into the BOC network design process.

386. We recognize that ONA is potentially more complex than interexchange equal access, and that the needs of ESPs are more numerous and more difficult to predict than those of interexchange carriers. We have accordingly avoided mandating any specific forms of ESP interconnection or prescribing any rigid schedules for their implementation. The absence of such a prescription makes it essential for the BOCs to develop an effective process for including ESPs in some fashion in their network planning processes. Some BOCs have expressed a general commitment to such interaction with ESPs in the future, with references to the roles that such organizations as the IILC

and the Switch Features Forum can perform.[955] We acknowledge those commitments and regard them as essential prerequisites to approval of the plans. However, we also seek concrete evidence that the BOCs are implementing those commitments.

387. Thus, the work the IILC has undertaken in providing a national forum for inter-industry cooperative efforts on ONA is important. Similarly, on a regional basis, the work that Pactel has reported on unbundled access to the ISDN D-channel is important, not only for the progress it has made toward the provision of a specific technical capability, but also because it represents a process in which Pactel personnel are working with ESPs in the design of network services.[956] It is impressive to see a display of technological expertise that makes a specific ONA service available; it is even more impressive, and more consistent with our ONA policies, when the application of such expertise is grounded upon a firm commitment to effective and continuing interaction with ESPs in the design of essential network capabilities.

388. Accordingly, we require each BOC to include in its plan amendments, to be submitted on May 19, 1989, evidence that it has incorporated into its network planning process an effective means of receiving input from ESPs regarding their future network needs and their use of advanced network technologies. We caution the BOCs that we will not approve any ONA plan on the basis of a mere expression of intent to engage in such a process, nor shall we accept any plan that merely provides for ESP involvement in the reconfiguration of existing network facilities.[957]

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955 See, e.g., Bell Atlantic Reply at 24-26.

956 SWBT may have engaged in a similar form of interaction to develop a means of delivering calling number identification through the Q.931 protocol, but we do not know for sure, because SWBT has described the end product of that development process without describing the process itself.

957 BOCs may be understandably concerned that the involvement of other parties could slow down their network development process, and that some parties might have incentives to use that process as a means of delaying improvements in the BOC basic networks. We therefore emphasize that the BOCs will retain ultimate responsibility for the design and implementation of changes in their networks; we are not establishing "industry consensus" as a prerequisite for implementation of new services. Furthermore, we caution ESPs, or parties with diverse business interests that include the provision of enhanced services, not to seek unnecessary delays in the deployment of new network services.

c. When and Where Future ONA Services Will Be Available

389. As discussed above, we recognize that some future ONA services contemplated by the BOCs are still under development and that, consequently, the BOCs cannot describe the precise technical form that those services will take. It seems equally probable that the BOCs will be unable to provide a geographic deployment schedule for some of these services. At the same time, however, it is obvious from a reading of comments and of some of the ONA plans themselves that many such services will be available in generics whose capabilities have already been announced to the BOCs by switching vendors. BOCs have already scheduled such generics for deployment in the 1989-1992 time frame.[958] We believe that the BOCs should project deployments of their initial ONA services through July 1, 1992, and, for many of the same reasons, we believe that the BOCs should project deployments of many ONA services offered through advanced technologies for the same time frame. This is especially true for CCS7-based services, some of which are included in the initial sets of ONA services that three of the BOCs will offer in 1989. The fact that a BOC may be planning to offer its first CCS7 services in 1990, rather than 1989, does not justify the omission of any deployment projections for those services.[959] Accordingly, for all ONA services that are not included in a BOC's initial set, but that the BOC concludes it can begin deploying before July 1, 1992, we require the BOC to provide, as feasible, the three-year deployment projections of the type we have required for the initial set.[960]

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958 In some cases those generics will be able to provide certain services only if the generics are augmented with feature packages or added equipment. Within the limits of their knowledge, we require each BOC to describe all ONA services that can be supported by generics that it has scheduled for deployment by July 1, 1992. A BOC must note any additional equipment or software that must be added to the switch and generic before the service can be offered to the public, and state whether it has yet decided to provide that additional equipment or software.

959 We recognize that deployment projections may be more difficult to make for some ISDN-based services, because not all ISDN standards have been completely specified yet.

960 See supra para. 363.

C. How BOCs Will Respond to Future ESP Requests for New ONA Services

1. ONA Requirements

390. The Phase I Order required the BOCs to specify procedures in their ONA plans that permit other enhanced service providers to request and receive new ONA services from BOC basic service operations in an expeditious manner.[961]

2. The BOC Plans

391. Several ONA plans describe procedures for dealing with future ONA service requests, but with sharply varying degrees of specificity. Ameritech is the only BOC that commits itself to a definite timetable for determining whether it will offer requested ONA services. It states that, within 120 days after it receives any complete, written request for a new ONA capability, it will provide a response that indicates whether it will provide the capability and, if so, when it will make the requested capability available, approximately how much it will charge for the service if actual demand meets estimates provided by the requesting ESP, and what, if any, technical problems are known to Ameritech.[962] Ameritech proposes to require that requests for new ONA services be accompanied by projections of demand for the requested capability "by location."[963]

392. NYNEX, SWBT, and US West promise to acknowledge requests for ONA services within a time certain, but they do not provide any timetable for final disposition. NYNEX states that, within 10 business days after receipt of correspondence from an ESP containing a request for a new ONA service, a member of its ONA Market Outreach Team will contact the requester to schedule a meeting.[964] NYNEX expresses a desire to interact with its ESP customers on an informal basis.[965] SWBT says that it will provide a written acknowledgment of any request for a new ONA service within 30 days of receipt, and that this response will contain an anticipated reply date.[966] It does

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961 Phase I Order, 104 FCC 2d at 1066, para. 217.

962 Ameritech Plan at 121.

963 Id. at 119.

964 NYNEX Plan at 65 n. *.

965 Id.

966 SWBT Plan at 142.

not commit to meet the anticipated reply date, however, nor does it indicate how long the typical response time will be. US West states that it will provide written acknowledgment of receipt of any future ONA service request within 10 working days,[967] but it does not mention any deadline for notifying the customer whether the ONA service will be provided.

393. Bell Atlantic, BellSouth, and Pactel focus on the organizational settings in which they will consider future ONA service requests. Bell Atlantic states that it will address ESP requests for new services within its marketing and technology planning departments.[968] It states that ONA team managers will be responsible for receiving requests, evaluating each request, and reporting the results of that evaluation process to ESP customers.[969] BellSouth states that it will establish procedures for all of its contact employees, such as network sales personnel, to direct ESP requests for ONA services not provided by BellSouth to appropriate product teams for resolution.[970] It states that the principal components of its technical feasibility analysis process for future consideration of ONA service requests will remain essentially unchanged, but that the process will evolve to become part of BellSouth's overall development process with equipment vendors.[971] Pactel states that it has created two "ESP Services" groups to handle such requests.[972]

394. NYNEX also describes the kinds of information that it will provide to this Commission when considering the deployment of new ONA services. It says that, if a NYNEX-owned ESP requires a new ONA service, NYNEX will file an amendment to its initial ONA plan at least 90 days prior to offering the enhanced service, but that, if the new ONA service will not be used by a NYNEX ESP, it will not feel compelled to file an amendment.[973]

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967 US Plan at 393.

968 Bell Atlantic Plan at 96.

969 Id.

970 BellSouth Plan at 86.

971 Id. at 88-89.

972 Pactel Plan at 13-14.

973 NYNEX Plan at 66 n. *.

3. Positions of the Parties

395. ADAPSO says that the plans fail to satisfy the requirement that the BOCs specify the procedures that the BOCs will follow to enable enhanced service providers to request and receive new ONA services "in an expeditious manner."[974] Hatfield notes that Ameritech is the only BOC that has committed to a final response time for ONA service requests, and it urges us to require other BOCs to make a similar commitment.[975] MCI argues that the plans are virtually silent as to how, if at all, requests for new network services will be considered, and it criticizes as inappropriate BOC demands that the ESPs provide the BOCs with potentially proprietary market research to justify requests for new ONA services.[976] Tymnet faults the BOCs for failing to provide adequate explanations of the criteria they will use to accept or reject requests for new ONA services.[977]

4. Discussion

396. While we are generally satisfied with the preparations that the BOCs have made for dealing with specific requests for new ONA services,[978] one essential commitment is missing from six of the plans. We require that the BOCs answer such requests definitively within a reasonable period of time with an explanation of the grounds for such decisions, based on the same factors that we established for selection of initial ONA services -- market demand, utility as perceived by ESPs, and costing and technical feasibility. If an ESP then believes that a BOC is providing the "wrong" answers, it has a basis for then pursuing further discussions with the BOC, or if necessary, seeking redress from this Commission. The 120-day response period proposed by Ameritech appears to be reasonable for these purposes.

397. Accordingly, we require each BOC, as a precondition to approval of its ONA plan, to amend its plan to provide that, within 120 days

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974 ADAPSO Comments at 27, citing Phase I Order, 104 FCC 2d at 1066.

975 Hatfield at 102.

976 MCI Comments at 29.

977 Tymnet Comments at 30.

978 We do not intend to prescribe any internal organizational structure that the BOCs should use to process ESPs' service requests, nor shall we attempt to dictate the internal procedures that the BOCs should follow in evaluating requests for new ONA services. Such efforts would not advance, and indeed could defeat, our main purpose in this area, which is to ensure that the BOCs give ESPs' requests for service fair and expeditious treatment.

after receiving any complete, written request for a new ONA capability, it will provide a response that indicates whether it will provide that capability and, if so, when it will make the requested capability available, approximately how much it will charge for the service if actual demand meets estimates provided by the requesting ESP, and what, if any, technical problems it anticipates.[979] We further require each BOC to describe in detail the criteria that it will use in determining when an ESP inquiry constitutes a complete request for a new ONA service.[980]

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979 We recognize the difficulties both the BOCs and ESPs encounter in projecting demand estimates for ONA services. Thus, some ESPs may be understandably reluctant to share marketing data with BOCs that are competing, or preparing to compete, with them. On the other hand, we expect the ESPs to contribute to a meaningful dialogue with the BOCs so that the BOCs and the ESPs, together, can assess the potential market demand for proposed new products and services. The BOCs are understandably reluctant to invest major sums in the deployment of services without having some ground for estimating the future demand for such services. To accommodate these conflicting concerns, we have directed the BOCs to discuss with the ESPs, under the auspices of the IILC or through a similar process, approaches that may resolve this problem. See supra para. 979. We note that AT&T maintains a Vendor Liaison Program (VLP) for independent CPE manufacturers and vendors, which provides a vehicle for these parties to discuss future plans and developments with AT&T network operations personnel without having the information shared with AT&T CPE personnel. In its ONA plan, AT&T has proposed to apply this program to ESPs in a way that may provide a model that BOCs and ESPs can use. See AT&T ONA Plan at 6-7.

980 We intend this process to be complementary to, but not a substitute for, the process we require the BOCs to establish for obtaining ESP input on the design and implementation of new network technologies. See supra at paras. 384-388. This 120-day response requirement applies to specific requests from ESPs for particular services to be offered in particular areas. The inability of the BOCs to provide such a service with current network technology is obviously a proper reason to deny such a request in the 120-day response period. It is, just as obviously, not a proper reason to remove that service from consideration in the long-term planning process. For example, "D-channel access" would currently be denied as a specific service request because ISDN has not been implemented in most areas, but "D-channel access" could be an appropriate topic for the new network technologies process.

XI. OTHER NONSTRUCTURAL SAFEGUARDS

A. Use of Customer Proprietary Network Information

1. The CPNI Safeguard

a. Background

398. The Phase II Order established four basic requirements governing BOC use of CPNI. First, BOCs must limit the access of their enhanced service personnel to a customer's CPNI if that customer so requests. Second, on customer request, the BOCs must release a customer's CPNI to any ESP designated by the customer, and the BOCs must make this information available on the same terms and conditions that they make CPNI available to their own enhanced service operations. Third, the BOCs must notify multiline business customers annually of these CPNI options. Fourth, if the BOCs make nonproprietary, aggregate CPNI available to their own enhanced services personnel, they must make such information available on the same terms and conditions to unaffiliated ESPs. We also required the BOCs to file ONA plans with us describing how they propose to comply with these requirements.

399. The Phase II Reconsideration clarified these requirements.[981] We required the BOCs to enclose with their CPNI notices response forms that customers could use to make CPNI elections. We also required the BOCs to accommodate requests for partial or temporary restriction of CPNI and to honor any customers' CPNI instructions received prior to the mailing of the CPNI notification. In addition, we clarified that a customer's election to restrict its CPNI would remain in effect until the customer specifically revokes this choice.[982] We directed the BOCs to amend their plans on or before

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981 The Phase II Reconsideration rejected arguments that we should condition BOC access to CPNI on customers' prior authorization. 3 FCC Rcd at 1162-63, para. 97. The Phase II Reconsideration also rejected a petition by SWBT to relieve the BOCs of their obligations with respect to aggregate CPNI, or, alternatively, to subject AT&T to the same obligation. Id. at 1164, para. 113-15.

982 We also exhorted the BOCs to take special care to protect the CPNI of customers that request restricted treatment of their CPNI by designating "network services only" personnel in their Centralized Operations Groups (COGs) or taking other steps to meet such customers' network service needs without compromising the confidentiality of their CPNI. Id. at 1163, para.

March 10, 1988, to reflect these modifications, and we instructed the BOCs to include copies of their proposed CPNI notice and response form with their amendments. We also required the BOCs to describe in their amended plans the types of information they will treat as CPNI and to explain their procedures for determining which customer has the right to restrict a particular item of CPNI.[983]

b. Positions of the Parties

400. Several parties argue that our CPNI rules are unfair and ask that we establish a prior authorization rule for BOC access to CPNI. Our present rules, they assert, bestow an unfair competitive advantage on the BOCs.[984] Some parties contend that the MFJ Court's March 7 Decision[985] prohibiting the BOCs from maintaining, selling, or releasing "user profiles," prohibits BOC use of CPNI, or at the very least, requires that BOCs obtain prior authorization before doing so.[986]

401. Most BOCs contest assertions that the March 7 Decision supersedes this Commission's CPNI rules. Bell Atlantic, for example, states that in prohibiting the BOCs from maintaining, releasing, or selling "user profiles," the MFJ Court was referring to profiles of customer use of enhanced services, not network services.[987] Similarly, Pactel and NYNEX note that the

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983 Id.

984 ADT Comments at 20-21; ATSI Comments at 8; CCTU Comments at 11-12; AICC Comments at 26-27.

985 United States v. Western Electric Co., Civ. Act. No. 82-0192 (D.D.C. Cir. March 7, 1988) (slip op.) (March 7 Decision), further opinion, Memorandum Opinion and Order, (D.D.C. June 22, 1988) (slip op.). The "MFJ Court" is the U.S. District Court for the District of Columbia that supervises the consent decree in that case. The decree is known as the Modified Final Judgment or MFJ.

986 See ADT Comments at 21; AICC-BellSouth Comments at 25; ANPA Comments at 26, 29; ADCU Comments at 62; ATSI Comments at 9 n. 19; IIA Comments at 27-28; Telenet Comments at 53-54; and Ameritech States Reply at 20, citing United States v. Western Electric Co., No. 82-0192, slip op. (D.D.C., March 7, 1988) at 33 n. 40.

987 Bell Atlantic Reply at 8-9.

MFJ Court specifically disavowed any intention to interfere with existing federal and state regulations and deferred to the expertise of this Commission in addressing issues of discrimination and cross-subsidization through appropriate regulations.[988] Finally, BellSouth argues that the existing CPNI rule is not discriminatory, as some claim, since it allows customers, rather than the BOCs, to control the dissemination of CPNI.[989]

c. Discussion

402. We have previously addressed and rejected arguments that our CPNI rules are unfair and that we should establish a prior authorization rule for BOC access to CPNI. The parties raise no new arguments in this proceeding that warrant a reversal of this policy. We also find nothing in the MFJ Court's March 7 Decision that is inconsistent with our CPNI rules. The court's restrictions with respect to "user profiles" would appear to relate to information about the use of enhanced or information services, not basic services, and thus would not be CPNI. Furthermore, our CPNI rules permit each customer to control the use of its CPNI, and thus are not discriminatory. Accordingly, there does not appear to be any conflict between that court decision and our CPNI rules. Indeed, the court explicitly deferred to this Commission to establish "mechanisms to address both the discrimination issue and the issue of cross-subsidization."[990] The CPNI safeguard provides such a mechanism. In any event, as we have previously stated, our review of BOC compliance with our Computer III requirements is independent of restrictions imposed by the MFJ.[991]

2. Information to be Treated as CPNI

a. The BOC Plans

403. Each BOC lists in its plan or plan amendment the information it proposes to treat as CPNI. These descriptions differ somewhat. NYNEX and BellSouth offer the most general descriptions. NYNEX defines CPNI as information related to the type(s), location(s), and quantity of all services to which a customer subscribes, how much the customer uses them, and the customer's billing records. BellSouth offers the same definition, but

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988 NYNEX Reply at 93; Pactel Reply at 37-38 n. 95.

989 BellSouth Reply at 58. See also US West Reply at 85 n. 202.

990 March 7 Decision at 50.

991 See, e.g., Phase I Order, 104 FCC 2d at 1012, n.160; Pacific Bell and Nevada Bell, Plan for the Provision of Voice Mail Services, Memorandum Opinion and Order, 3 FCC Rcd 1095, 1103 (Pactel Order).

qualifies it to include only information that BellSouth receives from its customers in the course of BellSouth's provision of common carrier services and that is not available from a source other than BellSouth or the customer.[992]

404. Other BOCs, except Pactel, propose to treat billing information as CPNI.[993] Pactel does not include billing information, per se, but it does include "usage data and calling patterns," (which might encompass billing information).[994] Ameritech also includes "usage data and calling patterns" within its definition of CPNI, while US West includes "traffic studies." Other proposed components of CPNI include: number of lines (Ameritech, SWBT, and Pactel); types of access lines (SWBT); class of service (Ameritech and SWBT); capacity of services utilized (Bell Atlantic); technical characteristics of service, such as speed of lines, touchtone, etc. (SWBT); service order and repair information (US West); and station message detail recording information (US West).[995]

405. None of the BOCs specifically includes credit history within its CPNI definition. Indeed, US West and Ameritech claim that they will not treat credit information as CPNI, although US West states that a customer's request for restricted treatment of CPNI will extend to use of the customer's credit information by US West enhanced services personnel.[996] In addition,

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992 NYNEX Reply at 89; BellSouth Reply at 55. This is a slightly expanded version of the definition offered by NYNEX and BellSouth in their plan amendments. See NYNEX Plan Amendment at 6; BellSouth Plan Amendment at 10.

993 Bell Atlantic for example, includes in its definition "monthly charges for all [network] services," while Ameritech includes "total billed revenue," and US West includes "the amount of billing." Bell Atlantic Plan Amendment at Appendix A, p. 90; Ameritech Plan Amendment at 15; US West Plan at 371-72. SWBT states that it will include current charges, long distance billing record, local measured service billing records, directory assistance charges, originating/terminating access charges, and bill summaries. SWBT Plan Amendment at 17.

994 Pactel Plan Amendment at 6.

995 In addition, some BOCs include customer name, address, and telephone number, and/or billing name, address, and telephone number within their CPNI definition. See Bell Atlantic Plan Amendment at Appendix A, p. 90; SWBT Plan Amendment at 17. US West specifically excludes this information. See US West Plan at 371.

996 US West Plan at 371-72 and Plan Amendment at 9-10; Ameritech Plan Amendment at 18 n. 6.

in their replies, Bell Atlantic and NYNEX state that they do not consider a customer's credit history to be CPNI.[997]

b. Positions of the Parties

406. Some parties argue that the BOC CPNI definitions are too broad.[998] The Ameritech States, for example, criticize the CPNI definitions of all of the BOCs except Ameritech on the ground that the definitions include unpublished and unlisted telephone numbers. The Ameritech States argue that this information should be given special protection, beyond that provided by the CPNI rules.[999]

407. ADT, ANPA, and ATSI allege that Bell Atlantic, Ameritech, and SWBT improperly propose to treat credit information as CPNI. Those commenters argue that it would be unfair to do so, since these BOCs would readily be able to determine potential customers' creditworthiness, while unaffiliated ESPs would either have to seek customer permission for access to the same information, or pay a credit bureau for potential customers' credit histories.[1000] ADT also argues that credit information would not enable the BOCs to better identify customers' telecommunications needs and that it is thus not the kind of information this Commission had in mind when it established CPNI rules that give the BOCs presumed access to CPNI.[1001]

408. ATSI and TCA also object to the inclusion within the CPNI definition of usage data and calling patterns by Pactel and Ameritech, and the inclusion of traffic studies by US West. ATSI claims that the availability of this information to BOC enhanced services personnel would enable such personnel to "steal existing customers away from competing vendors."[1002] It objects in particular to the availability of the

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997 Bell Atlantic Reply at 9, n. 16; NYNEX Reply at 91.

998 Many of those parties assume that the BOCs may not share with their enhanced services operations information that is not considered CPNI. Indeed, ANPA, ATSI, and AICC ask us to "reiterate" this rule so as clarify it for the record. ANPA Comments at 27; ATSI Comments at 17; AICC Reply at 16-17.

999 The Ameritech States Comments at 14.

1000 See ATSI Comments at 10; ADT Comments at 22-23; and ANPA Comments at 27.

1001 ADT Comments at 22.

1002 ATSI Comments at 10.

forwarded-to numbers[1003] of subscribers to voice messaging services, which, it claims, the BOCs could use to identify subscribers' ESPs. TCA argues that if CPNI includes usage data, calling patterns, and traffic studies, the CPNI rules would not adequately protect the privacy interests of callers, many of whom may provide "access by default" to a BOC.[1004]

409. Some parties, such as ANPA, ATSI, and ADCU, also claim that the CPNI definitions of BellSouth and NYNEX are too vague.[1005] They argue that unless these definitions are more specific, BellSouth and NYNEX will be able to manipulate the CPNI rules to their own advantage and to the disadvantage of their enhanced service competitors and end users.[1006] ADCU filed a list of information, distilled from various BOC descriptions of CPNI, which it claims represents a minimum acceptable definition of CPNI. Its list includes: billing name, address, telephone number, and account number (except if published); service name, address, and telephone number (except if published); number of lines; class of service; basic services used; usage data, traffic information, and calling patterns; network services taken (such as custom calling features); access arrangements and costs; billing information disaggregated into current charges, long distance records, local measured service, access and usage charges, and billing summaries; and credit information.[1007] ADCU states that if, due to regulatory burdens associated with the release of credit information, the BOCs choose not to make this information available to outside entities, the BOCs should be required to restrict the information from their enhanced services operations on customer request.[1008]

410. The BellSouth reply argues that its CPNI definition is sufficient since, in the Second BOC CPE Plans Order, the Common Carrier Bureau

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1003 The "forwarded-to number" refers to the number(s) to which a customer with call forwarding service forwards its telephone calls.

1004 TCA Comments at 12.

1005 See also Hello Comments at 9.

1006 Parties who assume that the BOCs may not share information that is not CPNI with their enhanced services personnel argue that the BOCs will improperly expand their definition of CPNI. Those who assume that the BOCs enhanced service operations are free to use information not subject to our CPNI rules express concern that the BOCs will unduly restrict their CPNI definitions. See infra note 33.

1007 ADCU Comments at 57.

1008 Id. at 57-58.

approved this definition for use in customer CPNI notices.[1009] US West and Pactel take issue with the claim that information that is not CPNI must be restricted from BOC enhanced services personnel. Those carriers argue that we have never established such a rule, and that such a rule would deny the benefits of BOC integration to consumers.[1010]

c. Discussion

411. Our CPNI rules apply, with minor exceptions,[1011] to all information about customers' network services and customers' use of those services that a BOC possesses by virtue of its provision of network services. The BOCs' CPNI definitions serve as a check that BOCs will comply with our rules in this sensitive area for the broadest possible range of customer-specific information. Thus, we agree with ADCU that the BOCs' CPNI definitions should not be unduly restrictive.[1012] We find that while the BOCs' CPNI definitions are largely adequate, some of these definitions are incomplete in one or more respects. For example, Pactel does not include billing information within its CPNI definition. In addition, only Pactel and Ameritech include usage data and calling patterns within their CPNI definitions. This is precisely the kind of customer information to which the

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1009 BellSouth Reply at 55, citing Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, CC Docket No. 86-79, DA 88-705, Order, (released May 11, 1988).

1010 Pactel Reply at 37; US West Reply at 86. US West also maintains that there is very little disparity in the BOCs' CPNI definitions. Id. at 85 n. 202.

1011 See infra paras. 412-415.

1012 ANPA, ATSI, and AICC argue that the BOCs' CPNI definitions are too broad or vague, apparently based on the assumption that our rules prohibit the BOCs from sharing with their enhanced service operations information in their possession that is not CPNI. This assumption is not correct. To the contrary, in replacing structural separation requirements with nonstructural safeguards, the Phase I Order specifically sought to avoid the lost efficiencies that result from restricted information flow. Phase I Order 104 FCC 2d at 1003, para. 80. Moreover, it is clear that a rule prohibiting the sharing of all information that is not CPNI would be infeasible in an integrated environment, since it could bar the BOCs from sharing with their enhanced services operations any information that was not included in customers' records. Under such a scenario, coordinated research and development as well as joint marketing, would be impossible. Thus, we reject claims that the BOCs must withhold information that is not CPNI from their enhanced services personnel.

CPNI rules apply, since it is information that can invoke proprietary and competitive considerations and that customers might thus want to restrict.[1013] It is also information that ESPs can use to better identify customers' enhanced services needs, and that customers might wish to make available to the BOCs' enhanced service competitors. Accordingly, by May 19, 1989 we require that: (1) Pactel amend its CPNI definition to add billing information for each network service a customer uses; and (2) all BOCs except Pactel and Ameritech must amend their definitions to include usage data and information on customer calling patterns.[1014]

412. We also clarify that we do not consider credit information to be CPNI. As noted above, CPNI is information about a customer's network services and its use of those services. This type of information is uniquely in the possession of the carrier serving the customer. Credit information, in contrast, only addresses information on whether, and how promptly, a customer pays its bills. Such information is available to every entity that does business with the customer.

413. ADT, ANPA, and ATSI argue that the BOCs will have a significant and unfair competitive advantage if BOCs are allowed to use telephone service credit information in their enhanced services operations, but are not required to share this information with unaffiliated ESPs. We do not find these arguments convincing. These parties seem to assume that information on a customer's credit history with a telephone company provides a virtually complete profile on the customer's creditworthiness. This, of course, is not the case. The credit history a BOC possesses is limited to information on customer payments of telephone bills, which may not always accurately reflect a customer's creditworthiness for purchase of enhanced services.[1015] Indeed, other, and arguably more useful, indications of

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1013 A similar analysis leads us to conclude that the "traffic studies" and "forwarded-to numbers" discussed in the record are CPNI, and are subject to our rules in this area. We discuss the specific treatment of forwarded-to numbers in paras. 436-437 below.

1014 In requiring these BOCs to treat this information as CPNI, we, of course, do not require them to use it in enhanced services marketing if they choose not to do so. We do require them, however, to honor customer requests to make this information available to unaffiliated ESPs or to restrict the BOCs' own enhanced services personnel from access to it.

1015 A customer that has a good credit history for basic telephone service may not be a good credit risk for enhanced services since disconnection from telephone service for nonpayment of enhanced service bills may not be available and the charges for certain types of enhanced services could be much larger than those for basic services.

creditworthiness are widely available from credit bureaus today. Furthermore, ESPs have credit information on their own current and former customers, which although not nearly as broadly based in terms of numbers of customers as that of the BOCs, is much more sharply focused on purchases of enhanced services.

414. Moreover, even assuming a BOC derives some utility for its enhanced service marketing from its basic services credit information, we do not think this constitutes an "unfair" or anticompetitive advantage. All firms use their own credit experiences with customers in determining future credit relationships. This is a legitimate business practice, which we do not think should be prohibited for the BOCs. Finally, given the existence of numerous state and federal laws and regulations governing the use of credit information, we see no need for further Commission control of this information at this time. We do wish to clarify, however, that in permitting the BOCs to use credit information in their enhanced service operations, we do not intend to supersede in any way restrictions on the use or dissemination of such information contained in such state and federal laws and regulations.[1016]

415. Finally, we agree with the Ameritech States that we should give unlisted telephone numbers special protection beyond that provided by the CPNI rules. An unlisted telephone number reflects a customer's general decision to restrict the availability of its telephone number. Accordingly, we prohibit the BOCs from making unpublished and unlisted telephone numbers available to their enhanced services personnel.[1017]

1016 Although we do not preempt state regulation of a BOC's use of credit information, we have preempted the states from imposing nonstructural safeguards, including CPNI requirements, that are inconsistent with those adopted in this proceeding. See Phase I Order, para. 344.

1017 We do not, however, prohibit the BOCs from marketing enhanced services to such customers when they contact the BOC to order or inquire about new or additional basic services. For example, if a customer with an unlisted number calls to order a second line, the BOC is free to market enhanced services to the customer, as well as additional basic services (e.g., Customer Calling I features), whether the second line is unlisted or not. The concerns we have about the BOC using its knowledge of the customer's telephone number for enhanced service marketing do not apply when the customer contacts the BOC.

3. Release of CPNI to Unaffiliated ESPs

a. The BOC Plans

416. All BOCs indicate that they will release a customer's CPNI to unaffiliated ESPs that the customer authorizes to receive that information.[1018] However, only Bell Atlantic, SWBT, and US West specifically state that they will make CPNI available to unaffiliated vendors on the same terms and conditions as it is available to their own enhanced service operations.[1019] The other plans are silent on this point.

b. Positions of the Parties

417. ANPA and ATSI claim that US West's Plan does not include a commitment to charge its affiliate the some price as it charges non-affiliated ESPs for similar or identical CPNI.[1020]

c. Discussion

418. While all of the BOCs state that they will release CPNI, pursuant to a customer's request, to unaffiliated ESPs, only three of the BOCs - Bell Atlantic, SWBT, and US West - state that they will make this information available on the same terms and conditions on which they make CPNI available to their own enhanced services operations. This is a fundamental aspect of our CPNI rules, and we require the BOCs that do not make this commitment to amend their plans to do so by May 19, 1989.

4. Procedures for Restricting BOC Access to CPNI

a. The BOCs Plans

419. The BOCs propose a variety of procedures for limiting the access of their enhanced services personnel to restricted CPNI. Bell Atlantic

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1018 SWBT, however, states that it construes its CPNI obligations, including, one would presume, its obligation to release CPNI on request, as extending to multiline business customers only. SWBT Plan, Appendix 27 at 6.

1019 See Bell Atlantic Plan at 91; SWBT Plan, Appendix 27 at 10; US West Reply at 89. US West's plan was initially ambiguous on this point, and a number of parties criticized it for that reason. The US West reply clarified its position.

1020 ANPA Comments at 28; ATSI Comments at 18. US West makes this commitment in its reply. US West Reply at 89.

states that it will "affix security indicators on specific customer account records" and that Bell Atlantic employees with access to CPNI may not "represent, promote, or sell enhanced services" to customers who choose to restrict the use of their CPNI.[1021] NYNEX states that "until appropriate computer system modifications can be implemented that will automatically restrict access to records containing restricted CPNI, enhanced services sales personnel will not be permitted to log onto or otherwise access the data bases that contain CPNI."[1022] NYNEX states that in this interim period, it will make unrestricted CPNI available to its enhanced services personnel through a distribution medium, such as hard copy or magnetic tape, that allows the exclusion of restricted CPNI.[1023] Ameritech states that it will mark data base records that contain restricted CPNI and that "[t]his notation will be designed to preclude enhanced services marketing personnel from using that customer's records in the sale of an enhanced service." Ameritech states that the information will be available to business office service representatives for use in dealing with customers' basic service needs.[1024]

420. US West will instruct its enhanced services personnel that they may not obtain access to restricted CPNI records, and it will, in some cases, flag restricted CPNI records. It states that to the extent flagging is not possible, it will instruct its enhanced services personnel that they may not obtain access to any customer's CPNI without first verifying that the account is unrestricted.[1025] In addition, US West will program some of its data bases containing CPNI with a password/identification (ID) security system that will prevent enhanced services personnel from obtaining access to restricted CPNI records.[1026] US West states that it will determine which

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1021 Bell Atlantic Plan at 92-93.

1022 NYNEX Plan, Appendix L at 3.

1023 Id. at 2-3.

1024 Ameritech Amendment at 18. According to Ameritech, Service Representatives conduct "[v]irtually all sales contact work" within the Ameritech Operating Companies, taking orders for new services, assisting customers in making changes to their existing services, and answering customer questions. Id. at 15.

1025 US West Reply at 91, n. 221. US West initially proposed to instruct employees that they may not use restricted CPNI in marketing enhanced services. See US West Plan at 373-74. Its reply, however, modifies its plan to change its use restriction to an access restriction.

1026 The US West reply states that this system will take time to implement and that, in the interim, it will either deny enhanced services personnel access to data bases containing restricted CPNI, or, if access is permitted,

data bases to program based on "the technical and economic feasibility for each impacted system and organization within US West[.]"[1027] SWBT states that it will program its systems containing CPNI to deny access to restricted CPNI to employees marketing enhanced services. It states, however, that in areas where workload will not justify maintaining both full-time network services personnel and integrated network/enhanced personnel, available sales staff will be designated "network services only" and bound by SWBT "network services only procedures" in handling restricted accounts.[1028] Pactel states that it will handle restricted accounts by following the procedures outlined for CPE personnel in its amended compliance plan, filed January 22, 1988, in CC Docket No. 86-79.[1029] That plan states that Pactel will flag all restricted accounts and "administratively prohibit" CPE sales personnel from using or divulging restricted CPNI for the generation of sales leads.[1030] BellSouth states that on receipt of a customer's written request to restrict CPNI, it may contact the customer to clarify the nature of the request. BellSouth will then, if the customer so desires, refrain from marketing enhanced services to that customer. BellSouth states that it may integrate its enhanced service customer records into existing regulated subscriber data bases, and that, in any event, enhanced services personnel may have access to existing service order processing systems for use in placing their enhanced service orders or to check on orders already placed. It states that such access will only occur prior to the posting of the order completion on the customer's record, and that data entries on these work orders do not contain information regarding the customer's existing services that are not affected by the new order.[1031]

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flag restricted CPNI records within the data base and prohibit enhanced services employees from obtaining access to those records. US West Reply at 90-91.

1027 US West Plan at 373.

1028 SWBT Plan, Appendix 27 at 8. SWBT does not elaborate on these procedures, although its plan does state that network service representatives are generally prohibited from marketing enhanced services to customers with restricted CPNI. See id. at 7-8.

1029 Pactel Plan at 51.

1030 Id. Appendix J at 1. The Pactel amended plan states that enhanced services personnel will not have access to restricted CPNI. See Pactel Plan Amendment at 7 and 8.

1031 BellSouth Plan at 78-79.

421. Each BOC states it will train employees regarding our CPNI rules and inform the employees that a violation of these rules could result in disciplinary action.[1032]

b. Positions of the Parties

422. Parties commenting on the BOCs' plans for restricting access to CPNI generally criticize all of the plans except that of NYNEX.[1033] Those parties argue that the only effective means of restricting CPNI access is a password/ID security system, and urge us to require all BOCs to implement one.[1034] ADCU, in particular, argues that mechanisms that simply note a use or access restriction on a customer's record are inadequate because such mechanisms only call attention to information that should be restricted.[1035] ADCU also criticizes Bell Atlantic's decision to prohibit enhanced services personnel from marketing enhanced services to customers requesting restricted treatment.[1036] ADCU argues that this approach violates our mandate to the BOCs to restrict access to, not use of, CPNI. It also claims that this procedure fails adequately to protect Bell Atlantic's enhanced service competitors, whose concern is not that Bell Atlantic will try to market enhanced services to them, but that Bell Atlantic will use their CPNI to identify and market to their customers.[1037] Finally, Telenet argues that BellSouth's procedures for clarifying CPNI requests should be disallowed. Telenet claims that these procedures are really an excuse to market enhanced services to sophisticated customers.[1038]

1032 See, e.g., NYNEX Plan, Appendix L at 2; US West Plan at 374; Ameritech Plan at 101.

1033 See ADT Comments at 24-25; TCA Comments at 10-11; ANPA Comments at 28; ADCU Comments at 58-60; ATSI Comments at 14; Hello Comments at 12-13; AICC Reply at 18; ICA Reply at 4.

1034 Although US West states that it will implement a password/ID security system for some CPNI, TCA criticizes US West for failing to indicate how widespread the use of passwords will actually be. TCA Comments at 10.

1035 ADCU Comments at 59.

1036 Hello also opposes approval of Bell Atlantic's plan for CPNI restriction on the ground that it is too vague. Hello Comments at 12.

1037 ADCU Comments 58-59.

1038 Telenet Comments at 52 n. 44.

423. In reply, US West, SWBT, and BellSouth defend their restriction procedures. US West states that this Commission has never ruled that a password/ID security system is the only acceptable way of protecting restricted CPNI. It further argues that a password system is not viable for certain kinds of CPNI, such as traffic studies, which are not found in the customer record electronic data bases.[1039]

424. BellSouth claims that its restriction procedures are adequate. It also responds specifically to Telenet's allegation that BellSouth will improperly market enhanced services in the guise of clarifying CPNI requests. BellSouth states that inevitably some requests will be ambiguous and that BellSouth must have authority to contact customers to clarify such requests. It further notes that the Bureau approved this proposal in the Second BOC CPE Plans Order.[1040]

425. SWBT responds to criticism of its restriction procedures by noting that since 1984, it has been required to restrict the access of its separate CPE and cellular radio affiliates and that there have been no complaints that it has failed to do so. SWBT also states that if it failed to honor a customer request for restricted CPNI treatment, the situation would probably come to the customer's attention.[1041]

c. Discussion

426. The BOC CPE Plans Order permits the BOCs to use one of two mechanisms for denying their CPE personnel access to restricted CPNI. Most BOCs use some form of a password/ID system that denies access to employees with CPE marketing responsibilities. Bell Atlantic and Pactel use a system in which they flag restricted account records and administratively prohibit personnel involved in CPE marketing from obtaining access to these records. This latter mechanism is sufficient in the CPE context because a customer's CPNI is of value to a CPE vendor mostly for marketing CPE to the customer itself. Thus, the use of restricted CPNI by BOC CPE personnel would likely be detected by the customer that requested that restriction.

427. An ESP's CPNI, on the other hand, is useful to other enhanced service vendors for marketing to other customers, including, perhaps, the ESP's customers or for designing a competing enhanced service. Therefore, an

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1039 US West Reply at 90. US West does not explain why password security systems are not viable for systems other than customer record electronic data bases.

1040 BellSouth Reply at 56.

1041 SWBT Reply at 63.

unaffiliated ESP may not be able to determine whether its request for restricted CPNI treatment is being honored and thereby act as a "watchdog" over the CPNI process. We accordingly cautioned the BOCs in the Phase II Reconsideration "to take special care to protect the CPNI of customers, especially enhanced service providers[.]"[1042]

428. We agree with the commenters who contend that a password/ID system is the preferred method for restricting CPNI access for enhanced services and should be used by the BOCs for that purpose, absent a specific showing that it would be unduly burdensome for them to do so. NYNEX has proposed such a system, and we approve this aspect of its plan. Ameritech, Bell Atlantic, BellSouth, and Pactel all propose various forms of "flagging" records and administrative prohibitions to restrict access to CPNI for which customers' confidentiality requests have been received. While the Common Carrier Bureau approved this procedure for certain BOCs for CPE purposes, for the reasons stated above, we believe the more complete protection provided by a password/ID procedure is needed in the enhanced services context.[1043]

429. US West and SWBT state that they will implement a password/ID system to protect restricted CPNI. However, US West states that in locations where a password/ID system is economically and technically infeasible, it will implement alternative measures. Similarly, SWBT states that in areas in which network services-only personnel are not justified in economic terms, it will instruct its employees to rely on "network services only procedures," in lieu of a password/ID system, in handling restricted accounts. However, neither US West nor SWBT describes its criteria for determining whether a password system is "economically and technically feasible" or "justified." Nor does either indicate the number of offices or accounts that will be outside the scope of its password system. Moreover, US West's proposed alternative of instructing employees not to access restricted CPNI, without even flagging restricted accounts, is inadequate. Under the circumstances, we cannot accept these plans in their present forms.

430. Therefore, we require each of the BOCs other than NYNEX to amend its CPNI plan by May 19, 1989 to incorporate a password/ID system that is comparable to that proposed by NYNEX. We will, however, permit a BOC to implement an alternative system to the extent that it demonstrates that a password/ID system is not feasible in particular end offices or for particular

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1042 3 FCC Rcd at 1163, para. 99.

1043 The Ameritech and BellSouth CPE CPNI plans filed in CC Docket No. 86-79 proposed password/ID security systems. See BOC CPE Plans Order, 3 FCC Rcd at 414, para. 20. Neither BOC explains why it proposes a different security system for enhanced services or why it cannot implement a password/ID system in this context.

data bases.[1044] A BOC must also demonstrate that its proposal is the most effective alternative under the circumstances.[1045] Until we approve the BOCs' amended procedures, as an interim measure, each BOC with an approved CEI plan should continue to follow the procedures described in its plan. BOCs without an approved CEI plan should describe their CPNI procedures in any future plan they file.[1046]

5. Customer to Which CPNI is Attributed

a. The BOC Plans

431. Bell Atlantic and NYNEX dispute our statement in the Phase II Reconsideration that in certain circumstances it may be unclear whether carriers should attribute a particular item of CPNI to an ESP or its customer.[1047] They argue that customer records reflect only those services the customer has ordered or that have been ordered on its behalf, and that each customer should control its own records.[1048] Ameritech also appears to argue that each customer should have control over information in its account records.[1049] SWBT states that it will treat information that pertains to a BSA, BSE, or other similar service of an ESP as the ESP's CPNI, and that it will treat information about a CNS, provisioned on an end user's line, as

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1044 For this purpose, generalized assertions, such as "economic infeasibility," will not suffice. BOCs that wish to implement an alternative system, in whole or in part, must provide evidence that a password/ID system and/or network services-only personnel are infeasible in the particular circumstances.

1045 As one possible alternative, we urge the BOCs to consider NYNEX's interim approach to CPNI restriction, which it will use until its password/ID system is operational. Under this approach, enhanced services personnel are denied access to systems containing CPNI, but are provided with unrestricted CPNI through a distribution medium such as hard copy or magnetic tape.

1046 For this interim period, CPNI procedures modeled on those the BOC is using for CPE will be acceptable.

1047 See Phase II Reconsideration, 3 FCC Rcd at 1163, para. 99.

1048 Bell Atlantic Plan Amendment at 3; NYNEX Plan Amendment at 7. To illustrate its point, Bell Atlantic states that the records of a customer that has ordered Call Forwarding services will not contain the forwarded-to number.

1049 Ameritech Plan Amendment at 19.

the end users' CPNI.[1050] BellSouth states that it will ascribe "ownership" rights to CPNI based on the entity that it bills for the service.[1051] US West states that in the case of dedicated private lines, the billed party will control CPNI treatment, while in the case of call forwarding, each customer will retain control over the information contained in its account records.[1052]

432. None of the BOCs except Pactel would allow an ESP to restrict a customers' CPNI without the customer's express authorization.[1053] Each argues that such a policy would violate customers' rights to control the use of their own account records. In addition, Ameritech argues that since it cannot restrict specific fields within a customer's records, it cannot accommodate requests by ESPs to restrict that portion of the CPNI that relates to the ESP. If it had to accommodate such a request, it states, it would have to restrict the entire record, which would be especially unfair to the customer.[1054] Pactel, on the other hand, states that, at an unaffiliated ESP's request, it will restrict the enhanced services-related CPNI of any customer of that ESP.[1055]

b. Positions of the Parties

433. ADT, ATSI, AICC, and ANPA support Pactel's proposal to permit unaffiliated ESPs to restrict the enhanced servicesrelated CPNI of their customers.[1056] They argue that in the absence of such a policy, a BOC would be able to identify the customers of its enhanced service competitors. ATSI claims that both of the options available to enhanced service competitors to prevent this occurrence are unattractive. Submitting a letter of authorization from the customer, it claims, would itself reveal the customer relationship that the ESP is trying to conceal. Likewise, ordering network

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1050 SWBT Plan Amendment at 18 n. 11.

1051 BellSouth Plan Amendment at 10.

1052 US West Plan Amendment at 8-9.

1053 See, e.g., Plan Amendments of Ameritech at 19; Bell Atlantic Plan at 3; US West Plan at 8-9.

1054 Ameritech Plan Amendment at 19.

1055 Pactel Plan Amendment at 7. Pactel also states that it will refrain from using the CPNI of residential customers in telemarketing enhanced services. See Pactel Reply at 38 n. 98.

1056 ADT Comments at 24; ATSI Comments at 11-12; AICC-Pactel Comments at 20; ANPA Comments at 28.

services on behalf of the customer might expose the customer to higher charges since at least one BOC, BellSouth, intends to charge ESPs more than end-users for the identical functionalities.[1057] ADT, ATSI, AICC, and ANPA urge us to require all BOCs to allow unaffiliated ESPs to restrict the enhanced service-related CPNI of ESP customers.

434. BellSouth replies that its policy of attributing CPNI to the billed party is not anticompetitive because ESPs can either ask their customers to request restricted CPNI treatment or order network capabilities for their customers from the ESP tariff.[1058] BellSouth also argues that its policy is the most appropriate one because it places control of CPNI with the party who pays for the underlying network service.[1059] Similarly, US West argues that allowing ESPs to restrict the records of their customers would violate customers' rights to control access to their CPNI. US West also claims that concerns about anticompetitive behavior by the BOCs are overstated, since "US West enhanced services personnel would not necessarily have knowledge of how a network service is to be utilized by the customer, or even if it is to be used with an enhanced service."[1060] Finally, NYNEX disclaims any intention to use aggregate CPNI and thereby seeks to assuage concerns of ESPs that it will attempt to identify and target their customers.[1061]

c. Discussion

435. All BOCs except Pactel state that they will attribute CPNI associated with a particular basic service to the entity that is billed for the service or in whose records the information appears. Pactel states that it will permit unaffiliated ESPs to restrict the enhanced services-related CPNI

1057 ATSI Comments at 12.

1058 BellSouth Reply at 57.

1059 Id.

1060 US West Reply at 87.

1061 NYNEX Reply at 92.

of their customers. Both approaches generally satisfy our requirements.[1062] However, we adopt certain restrictions for BOCs other than Pactel.

436. The Phase II Reconsideration noted that there may be ambiguity over whether a particular item of CPNI should be attributed to an ESP or to a customer of an ESP.[1063] The forwarded-to number in a call-forwarding service poses such an ambiguity. According to some parties, this information could be used by a BOC's enhanced services personnel to identify the customers of its ESP competitors, particularly VMS providers and telephone answering services. These parties claim that the BOCs could then target these customers for enhanced services marketing.

437. Bell Atlantic responds to this ESP concern with a technical solution. It states that the data bases that will be available to its enhanced services personnel for access to unrestricted CPNI will not include the forwarded-to number. We require the BOCs either to adopt this approach, i.e., delete the forwarded-to number from data bases used for CPNI access, or otherwise to take action to restrict access to this information by BOC enhanced service personnel.[1064] We find that the danger of unfair competition in the enhanced services market outweighs the benefit that would result from the availability of the forwarded-to number to BOC enhanced services personnel. Each BOC except Bell Atlantic must amend its CPNI plan for call forwarding to incorporate this change by May 19, 1989.

1062 ATSI claims that ESPs should not be required to obtain letters of authorization from their customers to restrict information in their customers' accounts because the very act of submitting such a letter identifies the customer relationship. This is not true to the extent that the customer itself submits the letter. Moreover, ATSI does not explain why an ESP's request for restriction of its customers' accounts would be any less revealing than its submission of a letter from the customer.

1063 3 FCC Rcd at 1163, para. 99

1064 This requirement would not preclude the BOCs from retaining the forwarded-to number in maintenance data bases, such as the Loop Maintenance Operation System, if enhanced services personnel are not able to access these systems.

6. CPNI Notices and Response Forms

a. The BOC Plans

438. Each BOC filed sample CPNI notices and response forms.[1065] In addition, each BOC represents that it will honor customers' CPNI elections, not expressly limited in duration, until the customers expressly change such elections.[1066] Each BOC also will honor customer requests for restricted treatment of CPNI that are received prior to the time the BOC sends its CPNI notice.[1067]

b. Positions of the Parties

439. Relatively few parties commented on the BOCs' proposed CPNI notices and response forms. ADCU states that the notices and forms achieve varying levels of success in accurately describing customers' CPNI rights. It urges us to establish a standard response form modeled after the sample form submitted by US West, provided that such form is amended to allow customers to request partial and temporary restriction of their CPNI.[1068] MPC objects to the tone of Bell Atlantic's sample CPNI notice. It claims that this notice is biased in so far as it refers to "exciting new" services, fails to explain the utility of billing records to an ESP, and suggests "that the Commission and the courts have conferred an exclusive right on Bell Atlantic to offer [enhanced] services."[1069] Bell Atlantic disputes the assertion that

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1065 Pactel proposes to send customers two CPNI notices and response forms. Customers that do not affirmatively request restricted CPNI treatment in response to the first notice will receive a second notice stating that Pactel will treat their CPNI as unrestricted if they did not respond to the second notice within thirty days. See Pactel Plan Amendment at 8.

1066 See, e.g., Bell Atlantic Plan at 91; US West Plan at 372; Pactel Plan Amendment at 9; Ameritech Plan Amendment at 20.

1067 See, e.g., Ameritech Plan at 100; Bell Atlantic Plan at 91; NYNEX Plan, Appendix L at 4.

1068 ADCU Comments at 55 n. 93. Noting that some of the BOCs have stated they cannot accommodate requests for partial or temporary restrictions on CPNI, ADCU states that, at the very least, these carriers should be required to follow the BellSouth approach of instructing customers to restrict all of their CPNI and then authorize release of part of it to BellSouth.

1069 MPC at 7-8. US Sprint claims that certain language in Pactel's sample notice is biased, though it terms Pactel's amended notice as "marginally better." US Sprint Comments at 34-35, n. 22.

its sample CPNI notice is biased in tone.[1070] MNPUC claims that US West's proposed notice is not sufficiently informative and fails adequately to explain how US West will treat CPNI prior to receiving customer responses.[1071] AICC opposes US West's request that it be permitted to use the response form it submitted for approval in CC Docket 86-79 because it should be required to provide complete and accurate information and meet at least the minimum requirement of the CPNI rules.[1072] AICC also argues that all BOCs should be required to send two CPNI letters to customers, as Pactel proposes.[1073]

c. Discussion

440. The Phase II Reconsideration required each BOC to file a sample CPNI notice and response form with its ONA amendment. We did not prescribe the specific wording. None of the notices and forms filed with the ONA plans, as presently drafted, fully and fairly informs customers of their CPNI rights. However, we note that in response to the Second BOC CPE Plans Order,[1074] each BOC has amended its CPNI notice and response form for CPE to incorporate changes specified by the Common Carrier Bureau. We find that the amended CPE notices and response forms, are satisfactory[1075] in all respects if those notices and response forms are adapted for use in the

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1070 Bell Atlantic Reply at 9.

1071 MNPUC Comments at 7.

1072 AICC-US West Comments at 28-29.

1073 AICC-Pactel Comments at 21-22.

1074 Second BOC CPE Plans Order at para. 17.

1075 We reject MPC's claim that Bell Atlantic's proposed CPNI notice is biased. We find it balanced in tone, and we note that unaffiliated ESPs can elaborate freely on how they can use CPNI when they seek authorization from a customer to obtain this information. MNPUC's objections to US West's notice are addressed by the changes required in the Bureau's Second BOC CPE Plans Order. Finally, we decline to require all BOCs to send two CPNI notices. While Pactel is free to implement this procedure, no party has established that a single notice is inadequate.

enhanced services context.[1076] Accordingly, we direct the BOCs to use these notices and forms, as adapted, for enhanced services purposes.

7. Partial and Temporary Restriction of CPNI

a. The BOC Plans

441. NYNEX and Ameritech state that they will permit customers with multiple accounts to restrict access to some but not all of their accounts.[1077] SWBT states that it will allow customers to select either service or billing records for restriction if they so choose.[1078] Bell Atlantic will allow customers to request that CPNI relating to specified services be restricted.[1079] Pactel states that it will honor requests for partial restriction of CPNI, though its sample response form provides space for customers to request partial release of CPNI, but not partial restriction.[1080] BellSouth states that it will inform customers that if they

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1076 The required adaptations are quite minor. In the Second BOC CPE Plans Order, the Bureau required the BOCs to include examples of CPE in their CPNI notices. In adapting these notices for enhanced services purposes, the BOCs should, similarly, include illustrative examples of enhanced services. These examples should suffice to explain the term "enhanced services." In addition, we require NYNEX to delete the lengthy, technical definition of enhanced services in the second sentence of its proposed notice.

1077 NYNEX Plan Amendment at 8-9; Ameritech Reply at 67.

1078 SWBT Plan Amendment at 17.

1079 Bell Atlantic Plan Amendment, sample response form.

1080 Compare Pactel Plan Amendment at 9 with Pactel Plan Amendment, Exhibit II (sample response form). In response to a Bureau order in the BOC CPE proceeding, Pactel subsequently amended its CPNI response form for CPE to allow for partial CPNI restrictions.

We assume that all of the BOCs accommodate requests for partial release of CPNI to outside entities. Indeed, several BOCs based their argument that customers should not be permitted to use BOC-provided response forms to authorize release of their CPNI to outside vendors, on the ground that the vendor would have to contact the BOC, notwithstanding those forms, to clarify the precise information needed. See NYNEX and US West Replies, February 22, 1988, in Support of their Amended Compliance Plans, CC Docket No. 86-79, at 5 and 5-6, respectively.

desire to restrict only a part of their CPNI, they should return a response form restricting all of it, and BellSouth enhanced services personnel can thereafter seek specific disclosure of the "nonrestricted" CPNI on an as needed basis.[1081] US West initially states that it will honor requests for partial CPNI restriction, but in its reply comments adopts the BellSouth approach.[1082]

442. BellSouth, Bell Atlantic, and Ameritech indicate that their customers will be able to elect restricted CPNI treatment either indefinitely or for a predesignated time period.[1083] US West and Pactel state that they allow customers to elect temporary restriction of CPNI; however, the response forms of these BOCs provide space for customers to authorize temporary access to their CPNI, but not temporary restriction.[1084] Neither SWBT nor NYNEX state that they accept requests for temporary restriction of CPNI.

b. Positions of the Parties

443. ADCU claims that Ameritech and NYNEX fail to allow partial or temporary restriction of CPNI. At a minimum ADCU argues, these BOCs should have to follow the procedures discussed in BellSouth's plan.[1085]

c. Discussion

444. Most BOCs allow for certain kinds of partial restrictions of CPNI. BellSouth and US West, on the other hand, propose a mechanism that will accommodate any partial restriction that a customer requests. These carriers

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1081 BellSouth Plan Amendment at 11-12.

1082 Compare US West Plan Amendment at 11-12 with US West Reply at 88-89.

1083 BellSouth Plan Amendment, Sample CPNI Response Form, Appendix B at 2; Bell Atlantic Plan Amendment at 5; Ameritech Plan Amendment at 21. See also Bell Atlantic and Ameritech sample CPNI response forms, attached to their Plan Amendments as Appendix A and Attachment 3, respectively.

1084 See US West Plan Amendment at 11 and Attachment B, sample CPNI response form; Pactel Plan Amendment at 9 and Exhibit II, sample CPNI response form. Both US West and Pactel filed amended CPNI response forms in response to the Bureau's Second BOC CPE Plans Order, in the BOC CPE proceeding. These amended forms permit customers to elect temporary restriction of their CPNI.

1085 ADCU Comments at 61.

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state that if a customer seeks to restrict only a part of its CPNI, they will advise the customer to restrict all of its CPNI and then authorize disclosure of selected portions of it to their enhanced services personnel. While we do not mandate this procedure, as we noted in the Second BOC CPE Plans Order, this is a reasonable way for the BOCs to handle requests for partial restrictions that they cannot otherwise accommodate.[1086] We do require SWBT and NYNEX to amend their CPNI plans to clarify that they will honor requests for temporary restrictions of CPNI.

8. Applicability of CPNI Rules

a. The BOC Plans

445. The Phase II Order explicitly noted that residential and single line business customers have the right to control access to their CPNI.[1087] SWBT states that its CPNI obligations should extend to multiline business customers only. Pactel on the other hand states that it will refrain from using the CPNI of residential customers in telemarketing enhanced services.

b. Positions of the Parties

446. ATSI and AICC state that all BOCs should be required to follow Pactel's lead and refrain from using the CPNI of residential customers.[1088] NYNEX opposes suggestions that we prohibit the BOCs from using residential customers' CPNI even if the customer has not requested restricted treatment. NYNEX argues that such a rule would be inconsistent with this Commission's intent to foster the growth of enhanced services.[1089]

c. Discussion

447. Since the Phase II Order explicitly noted that residential and single line business customers have the right to control access to their CPNI, SWBT must amend its plan to clarify that it will permit all customers -residential and single line business, as well as multiline business - to restrict their CPNI from access by SWBT enhanced service operations, and to

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1086 See Second BOC CPE Plans Order, para. 21 n. 46.

1087 2 FCC Rcd at 3096, para. 164. However, that order declined to require the BOCs to send CPNI notices to those customers. Id.

1088 ATSI Comments at 17 n. 41; AICC Comments at 25.

1089 NYNEX Reply at 88 n. 192.

arrange for the release of their CPNI to unaffiliated ESPs.[1090] We reject the suggestion of ATSI and AICC that we should prohibit all BOCs from using the CPNI of residential customers. Such a rule would deprive these customers of the full benefits of integrated marketing and of their ability to control access to their own CPNI. The Phase II Order stated that if it appeared that the CPNI of residential and single-line business customers was, in fact, being used on a large scale by the BOCs, we would entertain petitions for rulemaking to include residential and single-line business customers in the CPNI notification requirement. No such petitions have been filed.[1091]

9. Aggregate CPNI

a. The BOC Plans

448. All BOCs except Ameritech state that if they provide aggregate CPNI to their own enhanced service operations, they will make such information available on the same terms and conditions to unaffiliated ESPs.[1092] Bell Atlantic states that it will inform the industry of available aggregate CPNI by publishing semi-annually a list of aggregate CPNI that has been provided to Bell Atlantic enhanced service personnel.[1093] NYNEX states that it does not intend to provide its enhanced services personnel with aggregate CPNI, but that if it does, it will notify its enhanced service competitors of the availability of such information "by appropriate means such as publication in newsletters that are circulated to the enhanced services industry."[1094] US West states that it will list available aggregate CPNI in a catalog that ESPs can order.[1095] SWBT states that its Information Industry Marketing

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1090 2 FCC Rcd at 3096, para. 164.

1091 Id.

1092 Although Ameritech acknowledges the existence of this aggregated CPNI requirement (see Ameritech Plan Amendment at 4), it does not indicate in its Plan, its Plan Amendment, or its reply that it will comply with this requirement.

1093 Bell Atlantic Plan Amendment, Appendix A at 93.

1094 NYNEX Plan, Appendix L at 5. See also NYNEX Reply at 92.

1095 US West Plan at 379. US West states that it will provide, on request, the following data by end office: number of lines by business/residence; five-year forecast of line growth; average minutes of use (originating switched access); average call duration (originating switched access); average number of messages (originating switched access); and dual tone multi-frequency penetration. Id.

organization will maintain a log of aggregate data reports that ESPs, including those affiliated with SWBT, have requested. This log will include a brief description of the report, the entity that requested it, the date the request was made, and the date the report was provided.[1096] BellSouth states that "[n]otification will be in much the same manner that BellSouth makes CPE vendors and interexchange carriers aware of its products and services. These methods may include newsletters, seminars, individual personal contacts, letters, or other suitable forms."[1097] Pactel does not describe how it plans to notify the enhanced service industry of the availability of aggregate CPNI.

b. Positions of the Parties

449. No party objects to the aggregate CPNI procedures proposed by the BOCs.

c. Discussion

450. All the BOCs except Ameritech and Pactel propose a variety of measures that are reasonable means of notifying ESPs of the availability of aggregate CPNI information.[1098] We simply clarify that such notices should briefly describe such information, the terms and dates on which it will be made available, and how the parties may obtain it. In addition, Ameritech and Pactel must amend their ONA plans to describe how they will comply with our aggregate CPNI requirement by May 19, 1989.

1096 SWBT Plan, Appendix 27, at 15. SWBT states that, at the very least, it will make End Office Profiles, containing historical and forecasted business and residence line data for each end office, available to the enhanced services industry. In addition, it states that it will work with ESPs to generate other reasonable aggregate data reports that do not compromise proprietary interests of customers. Id.

1097 BellSouth Plan at 82.

1098 Ameritech does not mention aggregate CPNI in its Plan. Pactel states that it will make such information available to competing ESPs on the same terms and conditions as are applicable to its own enhanced operations, but does not describe how it will notify the enhanced service industry of the availability of this information.

B. Nondiscrimination in Installation and Maintenance

1. The Nondiscrimination Safeguard

451. The Phase II Order required the BOCs to include in their ONA plans a detailed description of the procedures they will utilize to ensure that they will not discriminate in their provision of ONA services, including the installation, maintenance, and quality of such services, to competitive ESPs and their customers.[1099] In addition, we required the BOCs to file quarterly nondiscrimination reports comparing the timeliness of their installation and maintenance of ONA services for their own enhanced services operations versus their enhanced services competitors, as well as the quality and reliability of ONA services that they provide to each.[1100]

452. The Phase II Reconsideration removed the quality reporting requirement for any BOC that demonstrated in its plan amendment that it lacked the ability to discriminate in the quality of its ONA/CEI services, provided that the BOC agreed to file an annual affidavit, signed by the officer principally responsible for installation procedures, attesting that it had followed the installation procedures described in its plan, as amended, and that it had not, in fact, discriminated in the quality of services it had provided.[1101] We also held that any BOC that demonstrated in its plan, as amended, that it lacked the ability to discriminate in the timing of its installation and maintenance service, and agreed to file an annual affidavit to that effect, would be permitted to modify the format of its installation and maintenance reports to compare the timing of services provided to its own enhanced service operations against a sampling of all customers.[1102]

2. BOC Nondiscrimination Procedures

a. The BOC Plans

(i) Installation Intervals

453. Each BOC asserts that it does not discriminate in the timeliness of installation service based on the identity of the ordering customer. Bell Atlantic, NYNEX, SWBT, Ameritech, and US West state that

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1099 2 FCC Rcd at 3084, paras. 88-89.

1100 Id. at 3086, para. 98.

1101 3 FCC Rcd at 1160, para. 76.

1102 Id. at 1161, para. 84.

unaffiliated ESPs use the same channels for ordering basic services as other customers, including the BOC's own enhanced service operations.[1103] Depending upon the particular BOC and the type of service involved, these channels may include COGs; interexchange carrier service centers (for BSAs that involve access services); and customer service centers. All BOCs except US West also state that they assign due dates for routine installation orders based on standard intervals for the types and quantities of services required.[1104] Those BOCs state that they negotiate due dates for more complex specially designed services, which do not fall within standard parameters, with the customer. The identity of the customer, they state, is not a consideration in this process.

454. Once the BOCs assign a due date for an installation order, they generally enter a service order into an automated service order distribution system. These systems receive, store, and distribute service orders to the various organizations responsible for providing the technical and administrative support necessary to complete the order.[1105] The BOCs generally complete work and dispatch personnel to meet the assigned due date.[1106] Pactel and Ameritech additionally state that they evaluate the performance of installation work groups based on their success in meeting due dates, so that employees in these groups have an incentive to provide the best possible service in all cases.[1107] All BOCs state that they train their employees to comply with our nondiscrimination rules and all except NYNEX

1103 Bell Atlantic Plan Amendment at 70-71; NYNEX Plan, Appendix K at 1; Ameritech Plan Amendment at 3-4; SWBT Plan Amendment at 4; US West ONA Plan at 392. Ameritech states that, to provide better service, it will refer requests relating to ONA offerings to a team specially trained to handle these orders. Ameritech Plan Amendment at 4.

1104 See Bell Atlantic Plan Amendment at 71; NYNEX Plan at 102; Ameritech Plan at 5; SWBT Plan Amendment at 5; Pactel ONA Plan at 41; BellSouth Plan at 54 and Plan Amendment at 8. In addition, Pactel represents that it makes information about its standard installation intervals available to the public. Pactel Plan, Appendix D at 2. US West does not describe its criteria for assigning due dates on installation orders.

1105 See Bell Atlantic Plan Amendment, Appendix B at 72-74; NYNEX Plan, Appendix K at 3; Ameritech Plan Amendment at 5; US West Plan at 397; SWBT Plan Amendment at 5-7; Pactel Plan, Appendix D at 1; BellSouth Plan at 54-58.

1106 See, eg., Bell Atlantic Plan Amendment at 72-73; Ameritech Plan Amendment at 7; and BellSouth Plan at 54-55.

1107 Pactel Plan Amendment, Exhibit I at 5; Ameritech Plan Amendment at 8.

and Pactel also state that they warn their employees that violation of these rules might result in disciplinary action.[1108]

(ii) Maintenance Intervals

455. All BOCs also claim that they provide maintenance service on a nondiscriminatory basis. They state that at the time a customer reports trouble, the customer will be assigned a repair due date. According to Bell Atlantic, due dates are based on work force availability and outstanding maintenance requests.[1109] Pactel assigns due dates based on the availability of service personnel for the geographic area of the trouble, the type of outage, the type of service involved, and the customer's availability at the premises.[1110] SWBT states that it assigns maintenance due dates on an ongoing basis based on work volume, available work force, and whether the problem is a total outage, merely affects service, or involves a bulk commitment.[1111] US West indicates that due dates vary, depending, in part, on geographic considerations, but does not otherwise indicate the criteria it uses in assigning repair due dates. It does state that it informs customers of the due date at the time they report a problem.[1112] Ameritech states that service restoration intervals depend strictly on circuit type and outage condition, such as whether the customer is completely out-of-service.[1113] NYNEX states that it establishes repair intervals based on the type of trouble, the need for a repair technician to visit the premises or physically examine or test outside plant, and the current work load.[1114] BellSouth states that it assigns

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1108 See Bell Atlantic Plan Amendment, Appendix B at 69-70; Ameritech Plan Amendment at 12; US West Plan Amendment at 4; SWBT Plan Amendment at 14-16; BellSouth Plan at 61; NYNEX Plan Amendment at 3 n. 8; Pactel Plan Amendment, Exhibit I at 5.

1109 Bell Atlantic Plan Amendment, Appendix B at 76. Bell Atlantic states that maintenance intervals are predetermined and updated at least daily, based on work force availability and outstanding maintenance orders.

1110 Pactel Plan, Appendix D at 3.

1111 SWBT Plan Amendment at 11-12. SWBT states that maintenance activity for special services is performed on a first-in, first-out basis, but does not indicate whether it assigns customers a projected repair date at the time the customer reports a special service problem.

1112 US West Plan at 400.

1113 Ameritech Plan Amendment at 8-9.

1114. NYNEX Plan, Appendix K at 8.

repair dates based on class of service, the type of outage (total or partial), and the appropriate commitment time for such an occurrence.[1115]

456. After determining the due date for a trouble report, all the BOCs use mechanized systems to isolate the problem, route trouble reports to the appropriate work groups, and track the progress of repair work. The particular work group and maintenance system to which the BOCs route a trouble report may vary, depending upon whether the problem relates to a service with specially designed circuits or a "nondesigned" service, such as "plain old telephone service" (POTS).[1116] For example, trouble reports associated with designed services may go to Special Service Centers that use the Circuit Installation and Maintenance System (CIMAP) to administer to the problem. Trouble reports associated with nondesigned services may be routed to a different maintenance organization that relies on the Loop Maintenance Operation System and the Mechanized Loop Test System instead of CIMAP. Pactel states that the variance in procedures is due to the sophisticated nature of special service circuits and the need for additional support capabilities in handling maintenance problems associated with them.[1117] Most BOCs state that they handle trouble reports for these more sophisticated designed services on a first-in, first-out basis, subject to limited exceptions for high priority emergency situations (such as hospital outages, etc.).[1118] Pactel and Ameritech state that they evaluate employees based on their success in meeting repair due dates, so that individual employees do not have an incentive to discriminate among customers.[1119] All BOCs state that they train maintenance personnel and that it is company policy to provide

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1115 BellSouth Plan at 62.

1116 See Bell Atlantic Plan Amendment, Appendix B at 74-75; Ameritech Plan Amendment at 9; SWBT Plan Amendment at 9-10; BellSouth Plan at 61; Pactel Plan, Appendix D at 4, and Plan Amendment at 3, 4. See also NYNEX Plan, Appendix K at 8.

1117 Pactel Plan, Appendix D at 4.

1118 Ameritech Plan Amendment at 9-10; SWBT Plan Amendment at 10; Bell Atlantic Plan Amendment, Appendix B at 76; BellSouth Plan at 62; Pactel Plan Amendment, Exhibit I at 3.

1119 Pactel Plan Amendment, Exhibit I at 5; Ameritech Plan Amendment at 10.

nondiscriminatory maintenance service.[1120] Most BOCs also state that they inform employees that a violation of this policy might result in disciplinary action.

(iii) Quality

457. Each BOC claims that its circuit provisioning procedures largely preclude discrimination in the assignment of equipment and facilities. The BOCs state that while they have not entirely eliminated human intervention in the circuit assignment process, they have kept it to a minimum.[1121] At the same time, however, Bell Atlantic and US West state that the degree of mechanization of their circuit assignment process varies to a certain extent within their territory. They state that this variance will be eliminated over time.[1122]

458. Many BOCs appear to rely on very similar systems and procedures for circuit design and equipment assignment. For example, BellSouth, US West, Ameritech, Pactel, and SWBT state that they use mechanized systems such as Facility Assignment and Control System (FACS) and Computer System for Mainframe Operations (COSMOS) to assign equipment for nondesigned services.[1123] FACS maintains an inventory of, and automatically assigns, local loop facilities. COSMOS automatically assigns central office equipment. For designed services, these BOCs use FACS for local loop assignment and the Trunk Integrated Records Keeping System (TIRKS) for trunk-side circuitry.[1124]

1120 US West Plan Amendment at 4; Ameritech Plan Amendment at 12-13; Pactel Plan Amendment, Exhibit I at 5; SWBT Plan Amendment at 14; BellSouth Plan at 62; Bell Atlantic Plan Amendment, Appendix B at 69-70; NYNEX Plan Amendment at 3 n. 8.

1121 See, e.g., BellSouth Plan at 56; US West Plan at 397.

1122 Bell Atlantic Plan Amendment, Appendix B at 72; US West Plan at 396.

1123 See US West Plan at 397-98; BellSouth Plan at 56-57; Ameritech Plan Amendment at 6-7; Pactel Plan, Appendix D at 1-2; SWBT Plan Amendment at 7. US West and BellSouth state that in some cases, they route nondesigned service orders to a Loop Assignment Center, where employees assign loop facilities manually based on information in the Exchange Customer Cable Records, and not through the mechanized FACS. US West Plan at 397-98; BellSouth Plan at 56-57.

1124 BellSouth Plan at 58-59; US West Plan at 398-99; Ameritech Plan Amendment at 5-6; and SWBT Plan Amendment at 5. Pactel appears to use TIRKS, as well, or at least a TIRKS-like system, but describes it as the Special Services Mechanized Design Process (SSMDP). See Pactel Plan Amendment, Exhibit I at 2.

According to these BOCs, each of these mechanized systems assigns circuit components based only on whether the components meet the technical requirements of the service. They state that the systems are blind to the identity of the customer or whether the customer is a BOC affiliate. They also state that their systems do not contain information on the relative quality of facilities in inventory, only standard facility descriptions and codings that indicate whether facilities meet particular tariffed parameters.[1125]

459. NYNEX does not describe by name the specific systems that it uses for circuit provisioning, though it claims that its provisioning processes are nondiscriminatory. It states that the assignment of facilities to implement a service order "is mostly automatic and is based solely on the next available facilities that meet the specified criteria."[1126] It further states that the mechanized systems that keep track of the available facilities do not take into account the identity of the ordering party, including whether it is a NYNEX affiliate. In addition, it states that these systems are unable to distinguish among the facilities in inventory other than by the standard facility descriptions and codings.[1127]

460. Bell Atlantic also maintains that its installation procedures preclude discrimination. It states that it uses "standard mechanized operating systems and procedures" for the provisioning of all basic services and that its systems "vary by type of service and make no distinction based on the identity of the customer[.]"[1128] It states that manual involvement in its provisioning processes is limited to non-discretionary extraction of data from one record system and the routine keystroking of such data into the next such system.[1129]

461. As described in its Plan Amendment, Bell Atlantic's provisioning procedures vary among its operating companies and based on whether the service is designed. C&P Telephone and New Jersey Bell route nondesigned service orders to a Loop Assignment Center, which "assigns the local cable facilities and/or the central office equipment using mechanized

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1125 See Ameritech Plan Amendment at 6; SWBT Plan Amendment at 13; US West Plan at 397; Pactel Plan Amendment, Exhibit I at 1-2.

1126 NYNEX Plan, Appendix K at 3.

1127 Id. at 3-4.

1128 Bell Atlantic Plan Amendment, Appendix B at 69.

1129 Id. at 71.

systems."[1130] Those companies route special service orders that require circuit design to the Circuit Provisioning Center, where FACS and the Enhanced Mechanized Assignment Record Conversion System assign facilities.

462. Bell of Pennsylvania and Diamond State Telephone route nondesigned service orders to a Customer Services Bureau, which mechanically assigns local cable facility and central office equipment. In assigning cable facilities, the Customer Services Bureau references the Dedicated Plant Assignment Card, containing the customer address and wiring limits, and the Exchange Customer Cable Record. For special service orders, local loop is assigned by the Distribution Services Engineering Center, which then forwards the order to the Circuit Provisioning Center, which "inputs it into" TIRKS.[1131]

463. All BOCs state that they train their employees that discrimination in the circuit assignment process is prohibited, and most also state that they inform their employees that a violation of this policy may result in disciplinary action.[1132]

b. Positions of the Parties

464. IDCMA, AICC, UCC/OC, and the Ameritech States challenge claims that BOCs lack any real ability to discriminate in the provision of network services. AICC, for example, states that while the BOCs claim that their installation and repair processes are largely mechanized, the BOCs do not demonstrate that this mechanization necessarily precludes discrimination.[1133] It states that the BOCs have not even attempted to show that the programming of their mechanized systems is not inherently discriminatory or capable of discrimination. Both AICC and IDCMA further argue that none of the BOCs has entirely eliminated human intervention in its circuit provisioning and maintenance process, so that even assuming that their systems are inherently nondiscriminatory, the BOCs still possess the ability to discriminate. They state that the opportunity to discriminate is magnified if the service involves customized design.[1134]

1130 Id. at 72.

1131 Id. at 73.

1132 See supra note 140.

1133 See, e.g., AICC-SWBT Comments at 31.

1134 AICC-Pactel Comments at 25; IDCMA Comments at 55-56.

465. AICC particularly criticizes NYNEX for not amending its description of its installation and maintenance procedures after the Phase II Reconsideration. Indeed, whereas AICC urges us merely to retain our original nondiscrimination reporting requirements for the other BOCs, it urges us to reject NYNEX's nondiscrimination plan and to require NYNEX to update it.[1135] AICC also argues that the use by BellSouth of special ONA tariffs tends to make discrimination inherent in the provisioning process.[1136]

466. Both AICC and IDCMA criticize Bell Atlantic for stating that it will discipline employees who intentionally provide inferior service, but not stating whether it will impose similar penalties if employees favor Bell Atlantic's unregulated operations.[1137] IDCMA argues that it is more likely that a BOC would provide preferential treatment to its affiliate than inferior service to its competitors. It states, for example, that maintenance personnel can readily access collocated equipment in order to perform required repairs ahead of schedule. It states further that only minor intervention in normal processes is required to engineer preferential treatment.[1138]

c. Discussion

(i) Installation Intervals

467. All BOCs except US West demonstrate that their installation procedures largely preclude them from discriminating, on the basis of the identity of the ordering customer, in the timeliness of installation service. They state that they assign due dates for routine installation orders based on standard intervals for the type and quantity of services ordered. The BOCs publish these standard intervals, which are generally available to unaffiliated ESPs and other persons placing installation orders.[1139] On the other hand, the BOCs admit that they must negotiate assigned due dates for more complex, specially designed services, but assert that the identity of the customer is not a consideration in this process.

1135 AICC-NYNEX Comments at 32-33.

1136 AICC-BellSouth Comments at 30.

1137 AICC-Bell Atlantic Comments at 29; IDCMA Comments at 55.

1138 IDCMA Comments at 53.

1139 Only the Pactel ONA plan states that information about its standard installation intervals for various services is available to its customers. However, the other BOCs' basic service tariffs either describe standard installation intervals or indicate that information about standard intervals is readily available to all customers.

468. Once the BOCs set these installation intervals, they prepare work orders that are distributed down-line to the various work groups responsible for completion of the order. The BOCs state that they track the actual installation process by mechanized systems, which establish priorities to meet assigned due dates. Contrary to the assertion of AICC, it appears that the BOCs program their installation systems in a neutral manner.[1140] Moreover, we find that although there is some room for human discretion in the installation process, the BOCs' procedures are sufficiently automated that discrimination in the timing of installation is difficult and unlikely. We thus approve the installation plans of all the BOCs except US West.[1141]

469. US West does demonstrate that its installation procedures are designed solely to meet the assigned due date. However, US West does not show that its procedures for assigning due dates are nondiscriminatory. Unlike the other BOCs, US West does not state that its due dates are generally standardized, and does not describe the criteria by which it assigns due dates. Therefore, we cannot conclude from US West's plan that it does not discriminate in the timeliness of the installation service it provides, and we direct US West to amend its plan to demonstrate the neutrality of its procedures for assigning installation due dates by May 19, 1989.

(ii) Maintenance Intervals

470. We also approve the maintenance plans of all BOCs except US West. Each of these BOCs demonstrates that it assigns repair dates to customers based on such nondiscriminatory criteria as available work force and the exigency of a service problem. These maintenance plans also show that the BOCs seek to resolve problems through standardized procedures. While the particular procedures may vary depending on whether the service is a nondesigned service, or a designed service that requires specialized attention, in either case BOC personnel are required to handle trouble reports on a first-come, first-served basis and to meet the assigned due date. Given

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1140 We also disagree with AICC's assertion that we should reject NYNEX's nondiscrimination plan because NYNEX did not amend this plan in response to the Phase II Reconsideration. NYNEX's original plan demonstrates that its installation procedures are mechanized and nondiscriminatory, and this plan is not, in fact, materially different from other BOCs' amended plans.

1141 While we approve Bell Atlantic's nondiscrimination plan for installation and maintenance service, it must clarify in its ONA Amendment that it instructs its employees that they may not discriminate either in favor of Bell Atlantic's enhanced service operations or against other ESPs in their network service functions.

these policies and procedures, discrimination in the maintenance process by these BOCs is highly unlikely.[1142]

471. Again, however, US West does not describe in sufficient detail the procedures by which it assigns repair due dates to its customers. Therefore, we do not approve US West's maintenance procedures, and require it to amend its description of its maintenance procedures to demonstrate that it establishes repair due dates on a nondiscriminatory basis by May 19, 1989.

(iii) Quality

472. All BOCs except Bell Atlantic show that their provisioning procedures and systems preclude quality-based discrimination. They show that they use mechanized systems to assign equipment and facilities and that these systems are programmed automatically to assign the next available facility in inventory. They also show that their systems are blind to the identity of the customer ordering the service, and that they contain no information about the relative quality of facilities in inventory except to classify them in accordance with standard descriptions and codings. Under the circumstances, quality based discrimination by these BOCs would be highly unlikely.

473. However, Bell Atlantic has not sufficiently demonstrated that it lacks the ability to engage in quality-based discrimination. Bell Atlantic claims that its procedures preclude discrimination and that manual intervention in the provisioning process is limited to the non-discretionary transfer of data from one record system into another. In addition, Bell Atlantic's provisioning procedures apparently are, at least, partially mechanized. However, apart from these generalizations, Bell Atlantic does not show that such mechanization precludes discrimination. For example, Bell Atlantic does not indicate whether its provisioning systems contain information about the relative quality of equipment in inventory, nor does it indicate how these systems assign various facilities. Moreover, Bell Atlantic's plan is ambiguous. For example, Bell Atlantic states that two of its operating companies assign local loop at the "Distribution Services

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1142 We do not condition this approval on the availability to ESPs of OSSs, diagnostic testing, or network configuration tools, since the nondiscriminatory maintenance procedures, coupled with maintenance reporting, should ensure that discrimination in the repair process does not occur. As noted above, a number of ESPs have included direct access to these network functions in their requests for ONA services. We have directed the BOCs to work with ESPs through the IILC to determine whether and how such services could be delivered to ESPs. See supra para. 110.

Engineering Center," but Bell Atlantic does not explain what this center is or how it prevents discrimination. Similarly, it states that a Customer Services Bureau assigns central office equipment, but it does not describe how. We therefore require Bell Atlantic to amend its plan by May 19, 1989, to clarify its provisioning procedures so as to demonstrate that it lacks the ability to discriminate in the quality of circuits it assigns.

3. BOC Nondiscrimination Reports

a. The BOC Plans

474. Each of the BOCs asks permission to file the annual affidavit described in the Phase II Reconsideration in lieu of quarterly quality reports. Each, except US West and Pactel, also seeks permission to modify the format of its installation and maintenance reports as specified in that order.[1143] In addition, US West asks that it be relieved of maintenance reporting requirements,[1144] and SWBT asks that it be relieved of all nondiscrimination reporting requirements, or, at least, maintenance reporting requirements.[1145]

475. The BOC ONA plans and amendments propose formats for their nondiscrimination reports. For its installation and maintenance reports, BellSouth proposes to report on average installation and maintenance intervals

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1143 Pactel states that it will file an annual affidavit attesting that it has followed the maintenance procedures described in its plan, as amended, and that it has not discriminated in its provision of maintenance service even though it does not request modification of the required format for its installation and maintenance reports. Pactel Plan at 44.

1144 US West filed with its Plan Amendment a petition for waiver of the maintenance reporting requirement. In its petition, US West proposes to file, in lieu of maintenance reports, an annual affidavit attesting that it has complied with the maintenance procedures described in its plan and that it has not discriminated in the provision of network maintenance based on customer affiliation. US West bases its petition on the ground that data base modifications required to generate maintenance reports will be "quite time-consuming and expensive, and there is little reason to have inconsistent maintenance reporting requirements for CPE and enhanced services." US West Petition for Waiver at 2.

1145 SWBT states that "its internal procedures as described [in its plan amendment] so effectively prevent any kind of service discrimination," that it should be relieved of the installation and maintenance timing report requirements, as well as the quality reporting requirement. SWBT Plan Amendment at 3.

and total orders in seven service categories: WATS/800; exchange service; two categories of analog private line (designed and nondesigned); and three categories of digital private line (DS1/DS3, 56 Kbps, and subrates).[1146] Ameritech proposes to report on the percentage of on-time completions of BSA and BSE services for its installation reports and the average trouble duration for its maintenance reports.[1147] Although Ameritech states that it will report its maintenance data by BSA, it does not say how it intends to disaggregate its installation reports. Bell Atlantic states that it will file installation reports showing percent of due dates met and maintenance reports showing average maintenance intervals for three digital private line services (subrates, 56 Kbps, and High Capacity); exchange service; private line analog service; and other services (primarily WATS/800).[1148] US West proposes the same format as Bell Atlantic, except that it will show total orders, as well, in each of its service categories.[1149] NYNEX states that it will report average appointment intervals, as well as percentage of due dates met for each of its BSAs in its installation reports. It states that it will provide data on average trouble duration for each of its BSAs in its maintenance reports. SWBT proposes installation reports that show the percent of due dates met for two service categories: nondesigned circuits, and designed and nondesigned special circuits. It states that we should not require further disaggregation at this time because of the limited base of SWBT customers.[1150] SWBT does propose a format for installation reports. Finally, Pactel proposes detailed installation and maintenance reports that show total orders, average intervals, percent of appointments missed, and party responsible for the missed appointment (i.e., Pactel or its customer). In addition, in its maintenance reports, it proposes to indicate the type of trouble reported and the type of service experiencing the trouble (e.g., voice mail or packet switching).[1151] It does not propose any service disaggregation in its installation reports.

476. None of the BOCs except Bell Atlantic propose a format for quality reporting. Instead, all BOCs argue that they have demonstrated an

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1146 BellSouth Plan Amendment, Appendix A.

1147 Ameritech Plan at 86.

1148 Bell Atlantic Plan Amendment, Appendix B at 76-78.

1149 See US West Plan at 401-02 and Appendix K (description of proposed installation reports); US West Plan Amendment, Attachment A (description of proposed maintenance reports).

1150 SWBT Plan at 134.

1151 Pactel Plan, Appendix G.

inability to discriminate based on quality and therefore should be permitted to file an annual affidavit in lieu of quality reports. Bell Atlantic states that if required to file quality reports, it will report on the incidence of trouble reports as a percent of circuits in service during each quarterly period for affiliated and nonaffiliated ESPs.

b. Positions of the Parties

477. IDCMA states that because of the potential for discrimination, we should not eliminate the quality reporting requirement until the BOCs make network management capabilities available to ESPs as a BSE. Network management systems, it states, would enable ESPs to verify the quality of their network services and expedite the resolution of network problems.[1152] IDCMA is supported in this request by NCR, Hayes, and the Ameritech States.[1153]

478. UCC/OC states that we should deny all requests for the elimination of reporting requirements until a record of competitive behavior by the BOCs has been established.[1154] It states that the adoption of formal procedures does not guarantee that the BOCs will follow them, and that "[g]iven the demonstrated proclivity of the carriers to engage in discriminatory practices, and the potential incentives for future abuse, regulations that rely upon self-policing are wholly inadequate."[1155] In addition, it asks us to require the BOCs to file an additional nondiscrimination report showing all complaints that the BOCs receive relating to service delays experienced by electronic news publishers. UCC/OC argues that electronic news publishers are particularly sensitive to service delays and that First Amendment considerations justify this additional reporting requirement.[1156] Finally, New Jersey urges that nondiscrimination issues be resolved at the state level or possibly a joint state-federal body.[1157]

1152 Id. at 54-55.

1153 NCR Comments at 2-4; Hayes Reply at 19; Ameritech States Reply at 13. The Ameritech States urges us to withhold approval of the BOCs' ONA plans until the BOCs clarify how they will provide ancillary services, such as network management, on a nondiscriminatory basis.

1154 UCC/OC Comments at 12.

1155 Id. at 13-14 (footnotes omitted).

1156 UCC/OC Comments at 18.

1157 New Jersey Reply at 10.

479. In their replies, Bell Atlantic, BellSouth, NYNEX, and SWBT respond to criticisms of their nondiscrimination plans.[1158] Bell Atlantic and BellSouth state that in arguing that their plans do not completely preclude the possibility of discrimination, IDCMA holds these plans to an unreasonable standard.[1159] Bell Atlantic also claims that UCC/OC's argument that we should not modify the Phase II Order reporting requirements until the BOCs have demonstrated a pattern of compliance with the nondiscrimination requirements is inconsistent with the Phase II Reconsideration.

480. Some BOCs also respond to arguments concerning the availability of network management capabilities. US West states that although it does not consider these capabilities to be BSEs, it already offers many of these capabilities to its customers, including circuit monitoring and diagnostic capabilities.[1160] Bell Atlantic states that, while additional technical and market analysis is required before it can commit to deployment of a BSE that provides access to operational support systems, it will initiate trials of such an offering during 1989.[1161] Finally, BellSouth argues that since its systems preclude discrimination, the absence of BSEs for network management capabilities does not justify retention of the quality reporting requirement.[1162]

c. Discussion

(i) Quality

481. As we have discussed in paragraphs 472-473 above, all of the BOCs except Bell Atlantic demonstrate that their provisioning procedures and systems preclude quality-based discrimination. Accordingly, we remove the quality reporting requirement for all BOCs other than Bell Atlantic. All of these BOCs must file the annual affidavits regarding quality specified in the Phase II Reconsideration.[1163] We will evaluate whether to remove this

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1158 See Bell Atlantic Reply at 19; BellSouth Reply at 51-52; NYNEX Reply at 84-86; SWBT Reply at 64.

1159 Bell Atlantic Reply at 19; BellSouth Reply at 51-52.

1160 US West Reply at 45-46.

1161 Bell Atlantic Reply at 16-17.

1162 BellSouth Reply at 53.

1163 The Phase II Reconsideration noted the sanctions for falsifying such an affidavit. See id., 3 FCC Rcd at 1172, n. 117. We will examine closely the representations made in such affidavits.

requirement for Bell Atlantic based on the showing it makes in its ONA amendments on this issue.

(ii) Maintenance Reporting Requirement

482. US West asks us to follow our CPE approach and eliminate the maintenance reporting requirement established in the Phase II Order. We deny this request.[1164] The BOC CPE Reconsideration Order permitted the BOCs to submit annual affidavits instead of maintenance reports for CPE customers, largely because the BOCs cannot generally determine the CPE being used by a customer that reports a network service problem.[1165] Without this information, we found, discrimination by the BOCs in their provision of maintenance service was highly unlikely. Moreover, we were concerned that requiring the BOCs to gather this information for maintenance reports would only make discrimination easier. As we noted in the Phase II Reconsideration, somewhat different considerations apply in the enhanced services context. The BOCs clearly will be able to identify trouble reports associated with their own enhanced services operations and it will often be easy for BOCs to determine whether a party experiencing trouble is an unaffiliated ESP.[1166] For these reasons, we retain the maintenance reporting requirement as a nonstructural safeguard.

(iii) Modification of Format

483. All BOCs except US West have shown that they employ procedures that should prevent discrimination in the timeliness of their installation and maintenance service. Therefore, we permit each BOC except US West to modify the format of its nondiscrimination reports to compare installation and maintenance performance provided for its own enhanced services with that provided to a sampling of all customers.[1167] Each BOC that so modifies its

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1164 Also, SWBT asks us to eliminate both the installation and maintenance reporting requirements. Aside from the fact that SWBT does not present its request in a proper petition for waiver or rulemaking, it does not justify its requests sufficiently. Accordingly, we deny them.

1165 Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, 3 FCC Rcd 22 (1988).

1166 Phase II Reconsideration at para. 84 n. 153 (BOCs will often be able to identify ESPs since many are major firms or will be enhanced service competitors of BOCs).

1167 US West will, of course, be permitted to make a similar modification

installation and maintenance reports must submit an annual affidavit, signed by the officer principally responsible for installation and maintenance operations, attesting that it has followed the nondiscrimination procedures outlined in its plan and that it has not discriminated in its installation and maintenance service based on the identity of the customer.[1168]

(iv) Disaggregation of Reports into Service Categories

484. US West, Bell Atlantic, and BellSouth propose to disaggregate their installation and maintenance reports into the categories required for their CPE reports. These categories concentrate heavily on private line services, and include business exchange service and WATS/800 as well. While these categories are appropriate for CPE reports, the categories are not entirely adequate for enhanced services reports. The Phase II Order expressly targeted CEI/ONA tariffed services for nondiscrimination reporting in the enhanced services context. We reasoned that requiring carriers to report comparative information about the provision to ordinary subscribers of a wide range of basic services, most of which have nothing to do with enhanced services, would be of limited value.[1169] We find that the CPE categories are not consistent with this directive since many of the services in those categories may have limited application in the enhanced services context.

485. NYNEX and Ameritech propose to disaggregate their reports by BSAs.[1170] However, those carriers do not show that this level of disaggregation is sufficient since several BSEs may be associated with a given BSA. Thus, if a sufficiently large number of BSEs are used with the same BSA, discrimination by a BOC limited to a particular BSE could be difficult to detect through reports based only on the underlying BSA users of the other BSEs. Moreover, many ESPs could use business lines or other existing services that may not be BSAs in the particular BOC ONA model.

486. SWBT proposes two categories: designed and nondesigned special circuits, and nondesigned services. We have found this level of disaggregation to be insufficient in the CPE context, and we likewise find it inadequate here. Finally, Pactel proposes two extremes. For its installation

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upon making the requisite showing concerning its installation and maintenance procedures.

1168 See supra note 1163.

1169 2 FCC Rcd at 3086, paras. 98-101.

1170 Ameritech does not make this clear for its installation reports, but we assume that it intends to use the same categories for its installation reports as it proposes for its maintenance reports.

reports, it proposes no service disaggregation. For its maintenance reports, it would indicate for each repair order the type of enhanced service involved. We find that Pactel should disaggregate its installation reports into appropriate basic service categories. At the same time, we are concerned that tracking the specific enhanced services offered by its network service customers might itself facilitate discrimination. We will not approve a reporting mechanism that would have this effect.[1171]

487. Because we find that none of the BOCs' proposed reporting categories is entirely adequate, we require each BOC to amend its plan to include new categories that reflect basic service categories relevant to its provision of enhanced services by May 19, 1989.[1172] Specifically, we require each BOC to report on each ONA service, including each BSA, BSE, and CNS that its enhanced services operation purchases for its provision of enhanced services.[1173]

(v) Data

488. We also require each BOC to show total orders, due dates missed, and average intervals for each category within its installation and maintenance reports.[1174] Currently, only Pactel proposes to provide data in each of these categories. We require the other BOCs to do so as well because data on the percentage of due dates missed, which the other BOCs do include in

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1171 Pactel's reports contain a substantial amount of information on its installation and maintenance activities, and we commend it for its efforts in this regard.

1172 We decline to require the BOCs to compile separate reports or separate reporting categories for electronic news publishers, as UCC/OC requests. We are reluctant to require the BOCs to track particular customers' use of network services, because this in itself could facilitate discrimination. Moreover, we will ensure that the reports are sufficiently disaggregated by service as to reveal discrimination in any enhanced service context, including electronic news.

1173 In addition, because ESPs widely use ordinary business lines in providing enhanced services, if a BOC's ESP operation uses such lines it should include such services as a category in its report. Those BOCs that do not use the locution "BSAs" within their plan like US West, should disaggregate their reports to report on the access arrangements that ESPs will use.

1174 If a BOC does not establish a firm due date for a particular repair problem, the BOCs need only report the average maintenance interval for that item.

their reports, would not, by itself, provide sufficient information regarding discrimination in the assignment of due dates. Providing data in these categories should not be burdensome for the BOCs, since each of them tracks this information in its service order processing systems. Thus, we require the other BOCs to amend their plans by May 19, 1989 to include this data report requirement.

C. Network Information Disclosure Requirements

1. Background

489. The Phase II Order required the BOCs to disclose, at two different points in time, information about changes in their networks or new network services that affect the interconnection of enhanced services with the network.[1175] First, at the "make/buy" point - that is, when a BOC decides to make itself, or procure from an unaffiliated entity, any product the design of which affects or relies on the network interface - the BOC must notify the enhanced services industry[1176] of the new or changed network service, and disclose technical information about the new or changed service to those members of the enhanced services industry that execute a nondisclosure agreement. The BOC must provide this information within thirty days of the execution of such agreement. Second, twelve months before a new or modified network service is introduced, a BOC must publicly disclose technical information about the service. If the BOC can introduce the service within twelve months of the make/buy point, it may make a public disclosure at the make/buy point, but not less than six months before the introduction of the service.

2. Positions of the Parties

490. Although we did not ask the BOCs to include network disclosure procedures in their plans, since the BOCs are obligated to obey these rules, parties raise certain issues on this topic. IDCMA claims that SWBT does not clearly indicate its recognition of the fact that our network disclosure rules are independent of our rule requiring BOC disclosure of new BSEs or BSAs.[1177] In addition, several parties question whether the notification procedures that the BOCs planned are adequate, particularly for small ESPs.

1175 Phase II Order, 2 FCC Rcd at 3087-88, paras. 107-12.

1176 The Phase II Order clarified that the term "enhanced services industry" includes any entity directly involved in the manufacture of equipment to provide enhanced services, or the design, lease, or sale of enhanced services. Id. at 3092 para. 138.

1177 IDCMA Comments at 43. See also NTIA Reply at 23 n. 28.

491. IDCMA also asks us to clarify that the BOCs' disclosure obligations extend to information concerning network design, technical standards, interfaces, and the manner in which interconnected enhanced services will interoperate with the network, as well as market information regarding the intended geographic availability of new network services or capabilities, the timing of introduction, pricing, and costs. IDCMA argues that the stated intention of the BOCs to use generic publications to fulfill their disclosure obligations raises the question of whether they will provide this full range of information. It also claims that the NYNEX plan refers only to interface specifications.

492. Finally, IDCMA asks us to limit BOC use of patented interfaces for network services. Noting that NYNEX will use a patented interface for its "alarm transport services" BSA, IDCMA expresses concern that the BOCs will leverage their dominant position in the local exchange to obtain preferential licensing agreements or to restrict the licensing of others.[1178] IDCMA asks us to prohibit BOC use of patented interfaces unless the patent holder complies with the safeguards described in the Plugs and Jacks Order.[1179] Specifically, IDCMA states that the patent holder should be required to (1) use standardized, uniform license agreements; (2) charge only uniform, reasonable royalties; (3) make available without charge, adequate product information to assure that independent companies are able to manufacture the product; and (4) make available licenses on worldwide patents upon request and at no extra charge.[1180]

3. Discussion

493. The issues raised by parties regarding network disclosure procedures require clarification. Our rules concerning disclosure of new BSEs and BSAs do not displace our network disclosure rules. Both notification requirements exist independently. BOCs should maintain a list of those in the enhanced services industry or their representative trade associations[1181]

1178 IDCMA Comments at 37-38; accord Hayes Reply at 22.

1179 Revision of Part 68 of the Commission's Rules to Specify Standard Plugs and Jacks for the Connection of Telephone Equipment to the Nationwide Telephone Network, 62 FCC 2d 735 (1976). This order imposed requirements on AT&T with respect to its licensing of its patented plug and jack designs. Hayes supports IDCMA's recommendation. See Hayes Reply at 22.

1180 IDCMA Comments at 42.

1181 Although we do not require the BOCs to disclose technical information to

that wish to be notified at the make/buy point of new or modified network services. The BOCs should mail an announcement of a new or modified service at the make/buy point to each entity on the list.

494. We note that past orders have described the information within the scope of our network disclosure requirements.[1182] Many of the types of information that IDCMA describes are addressed in those orders. While this by no means resolves all ambiguities concerning the scope of information that the BOCs must disclose, we see no need to address in this context the extent of disclosure required for each such piece of information, which will vary depending upon individual circumstances. However, we expect the BOCs to work with the enhanced service industry within the framework of our network disclosure rules and their own legitimate proprietary concerns to enable unaffiliated ESPs to make full and efficient use of BOC network services.

495. Finally, IDCMA and Hayes express concern about specified interfaces. IDCMA does not allege that NYNEX has obtained any preferential licensing rights with respect to this patent or that licenses will not be generally available on reasonable terms. Indeed, NYNEX states that its own enhanced services operations will not use specialized interfaces that are unavailable to other ESPs.[1183] We note, however, that our rules already limit carriers' use of patented interfaces.[1184] Since this proceeding does not alter either the letter or the spirit of those rules, we see no need to establish further rules or principles on this issue in this proceeding.

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trade associations, we require the BOCs to notify trade associations that ask to be placed on the mailing list of impending network changes. Trade associations should assist with the dissemination of this information, particularly to ESPs that do not wish to identify themselves to the BOCs, and thus choose not to be placed on the mailing list themselves.

1182 See, e.g., Phase I Order at 1082-84, paras. 250-52; Phase II Order at 3087-38 paras. 107-112; Computer and Business Equipment Manufacturers Association, Report and Order, 93 FCC 2d 1226 (1983).

1183 NYNEX Reply at 45.

1184 See Section 68.104 of our Rules, 47 CFR §68.104. See also Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS), 56 FCC 2d 593, 611 (1975); Plugs and Jacks Order, supra note 198.

XII. CONCLUSION

496. As explained in Section I, our schedule for BOC amendments to the plans reflects our goal to have the public realize the benefits of ONA consistent with ensuring that ONA operates as a safeguard against anticompetitive activities by the BOCs. The following summarizes the BOC amendments due on May 19, 1989:

A. The Common ONA Model

(1) Each BOC must state that it will offer its BSEs and BSAs in compliance with our rules for BSEs;[1185]

(2) Each BOC must explain in detail its plans, if any, to offer ESPs information similar to that available through the recording function;[1186]

(3) Each BOC must describe which OSSs, if any, it will offer to ESPs;[1187]

(4) Each BOC must reclassify the basic services it now treats as ANSs as either BSEs, BSAs, or CNSs;[1188]

B. Initial ONA Offerings

(5) Each BOC must include a more comprehensive description of the manner in which it applied the criteria established in the Phase I Order for determining its initial set of ONA services;[1189]

(6) Each BOC must report on its attempts to develop, through the IILC or a similar process, procedures and formats that ESPs may use in requesting ONA services from the BOCs, including the use of contracts or other

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1185 See supra para. 78.

1186 See supra paras. 108-109.

1187 See supra para. 110.

1188 See supra para. 106.

1189 See supra para. 134.

procedures whereby proprietary market information can be exchanged without sacrificing its confidential status;[1190]

C. Compliance With CEI Requirements

(7) Each BOC except Ameritech must list the publicly available documents that describe the technical characteristics and interface information required by ESPs to interconnect with the BOC's basic service network;[1191]

(8) Pactel must state the conditions under which ESPs not affiliated with it will receive ONA services with technical characteristics that are equal to those that its ESP operation receives;[1192]

(9) BellSouth must alter or more fully explain its proposal for satisfying our requirement concerning minimization of transmission costs for ESPs;[1193]

D. Uniformity

(10) Each BOC except Bell Atlantic must list the additional services it can include in its initial ONA offerings, based on the results of an examination of all other BOCs' proposed initial ONA offerings;[1194]

(11) Each BOC must describe its efforts, through the IILC, to implement uniform nomenclature and technical configurations for similar ONA services and to improve cross-referencing efforts when strict uniformity is not feasible or desirable;[1195]

1190 See supra para. 135.

1191 See supra paras. 143, 149.

1192 See supra para. 149.

1193 See supra paras. 170-171.

1194 See supra para. 205.

1195 See supra paras. 206-207.

(12) Each BOC must describe how it will systematically address uniformity issues involving specific ONA services of particular interest to the ESP industry;[1196]

E. Tariffing

(13) Each BOC except Ameritech and NYNEX must describe its proposed state tariff structures more fully;[1197]

(14) BellSouth must eliminate its proposal to prohibit ESPs from taking basic services from existing tariffs and to require them to take all basic services out of a new ONA tariff; [1198]

(15) SWBT and BellSouth must either delete or fully justify certain use restrictions in their proposed tariff structures;[1199]

(16) Pactel must clarify whether it is proposing resale restrictions on ESPs and, to the extent it is doing so, include with its amendments a detailed showing of why such restrictions are justified;[1200]

(17) US West must describe how it will comply with our requirement that, in applying its price parity approach to a distance-sensitive transmission tariff, it will charge its enhanced service operations no less than it would an ESP located two miles away from the relevant central office for purposes of that tariff;[1201]

(18) Pactel must describe its banded pricing approach, if any, in greater detail, and how price parity would operate under such an approach;[1202]

1196 See supra para. 207.

1197 See supra paras. 227, 284.

1198 See supra paras. 284, 312.

1199 See supra paras. 284, 312, 324.

1200 See supra para. 325.

1201 See supra para. 168.

1202 See supra para. 169.

(19) Each BOC except SWBT must include sample tariffs that are similar in detail to the sample tariffs provided by SWBT; [1203]

F. Initial Deployment and Future Evolution

(20) Each BOC must provide a schedule showing its planned deployment of its initial ONA services as of July 1 of 1990, 1991, and 1992. In addition, each BOC should include with its amendment a report on the results of its IILC discussions on the format of wire center deployment information;[1204]

(21) Each BOC must describe the ONA services that it views as being technically possible to offer based on its current understanding of CCS7, ISDN, and Intelligent Network technologies, including the manner in which it will organize and offer those ONA services to ESPs;[1205]

(22) Each BOC must describe the process that it has developed for receiving input from ESPs on future network technologies and ONA services; [1206]

(23) Each BOC must also submit an amendment describing a three-year deployment projection for all ONA services that are not included in its initial set of services, but that the BOC concludes it can begin deploying before July 1, 1992;[1207]

(24) Each BOC must state that, within 120 days after receiving any complete, written request for a new ONA capability, it will provide a response that indicates whether or not and on what terms it will make the requested capability available; in addition, each BOC must describe in detail the criteria it will use in determining when an ESP inquiry constitutes a complete request for a new ONA service;[1208]

1203 See supra para. 330.

1204 See supra para. 363.

1205 See supra para. 383.

1206 See supra para. 388.

1207 See supra para. 389.

1208 See supra para. 397.

G. Nonstructural Safeguards

(25) CPNI

(a) Pactel must add billing information to its definition of CPNI;[1209]

(b) Each BOC except Pactel and Ameritech must include usage data and information on customer calling patterns in its CPNI definitions;[1210]

(c) Each BOC except NYNEX must incorporate into its CPNI plans a password/ID system comparable to the system NYNEX proposes;[1211]

(d) Each BOC except Bell Atlantic must amend its CPNI plan for Call Forwarding services either to delete the forwarded-to number from data bases used for CPNI access, or otherwise to take action to restrict access to this information by BOC enhanced service personnel;[1212]

(e) SWBT and NYNEX must clarify that they will honor requests for temporary restrictions of CPNI;[1213]

(f) SWBT must clarify that it will permit all customers (residential, single-line business, and multiline business) to restrict their CPNI from access by SWBT enhanced service operations, and to arrange for the release of their CPNI to unaffiliated ESPs;[1214]

(g) Ameritech and Pactel must describe how they will comply with our aggregate CPNI requirement;[1215]

(h) Ameritech, BellSouth, NYNEX and Pactel must clarify that they will release CPNI, pursuant to a customer's request, to unaffiliated ESPs

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1209 See supra para. 411.

1210 See supra para. 411.

1211 See supra para. 430.

1212 See supra para. 437.

1213 See supra para. 444.

1214 See supra para. 447.

1215 See supra para. 450.

under the same terms and conditions available to their own enhanced service operations;[1216]

(26) Installation and Maintenance

(a) Bell Atlantic must clarify that it instructs its employees that they may not discriminate either in favor of Bell Atlantic's enhanced services operations or against other ESPs in their network functions;[1217]

(b) US West must demonstrate the neutrality of its procedures for assigning installation and repair due dates;[1218]

(c) Bell Atlantic must clarify its provisioning procedures to demonstrate that it lacks the ability to discriminate in the quality of circuits it designs;[1219]

(27) Nondiscrimination Reports

(a) Each BOC must include new reporting categories that reflect basic service categories relevant to its provision of enhanced services;[1220]

(b) Each BOC except Pactel must describe how it will provide data for each category within its installation and maintenance reports.[1221]

XIII. ORDERING CLAUSES

497. IT IS HEREBY ORDERED, that pursuant to Sections 1, 4(i) and (j), 201, 202, 203, 205, 218, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201, 202, 203, 205, 218, and 405,

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1216 See supra para. 418.

1217 See supra note 1141, para. 468.

1218 See supra paras. 469-471.

1219 See supra para. 473.

1220 See supra para. 487.

1221 See supra para. 488.

and 5 U.S.C. § 553, the ONA plans of Ameritech, Bell Atlantic, BellSouth, NYNEX, Pactel, SWBT, and US West ARE APPROVED IN PART AND REJECTED IN PART, subject to the conditions described herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

BOCs Filing ONA Plans

Ameritech Operating Companies (Ameritech)
Bell Atlantic Companies (Bell Atlantic)
BellSouth Corporation (BellSouth)
NYNEX Telephone Companies (NYNEX)
Pacific Bell, Nevada Bell, Pactel Communications Companies, and Pacific Telesis (Pactel)
Southwestern Bell Telephone Company (SWBT)
US West, Inc. (US West)

Parties Filing Comments

Association of Data Processing Service Organizations (ADAPSO)
ADT Security Systems, Inc. (ADT)
Alabama Public Service Commission (Alabama)
Alarm Industry Communications Committee (AICC plus BOC abbreviation--e.g., AICC-Ameritech)
ALC Communications Corporation (ALC)
American Library Association (ALA)
American Newspaper Publishers Association (ANPA)
American Petroleum Institute (API)
API Alarm Systems and Wells Fargo Alarm Services (API/Wells Fargo)
Arizona Corporation Commission, The Colorado Public Utilities Commission, The Idaho Public Utilities Commission, The Iowa State Utilities Board, The Nebraska Public Service Commission, The North Dakota Public Service Commission, The South Dakota Public Utilities Commission, and The Utah Public Service Commission (Arizona)
Association of Data Communications Users, California Bankers Clearing House Association, Committee of Corporate Telecommunications Users, Mastercard International Incorporated, New York Clearing House Association, VISA U.S.A., Inc. (ADCU)
Association of Telemessaging Services International, Inc. (ATSI)
American Telephone and Telegraph Company (AT&T)
People of the State of California and the Public Utilities Commission of the State of California (California)
Coalition of Open Network Architecture Parties (CONAP)
Committee of Corporate Telecommunications Users (CCTU)
CompuServe Incorporated (CompuServe)
Computer and Business Equipment Manufacturers Association (CBEMA)
Digital Equipment Corporation (DEC)
Public Service Commission of the District of Columbia (District of Columbia)
Dun & Bradstreet
Enhanced Services Council (ESC)
Florida Public Service Commission (Florida)
Hatfield Associates, Inc. (Hatfield)
Hayes Microcomputer Products, Inc. (Hayes)
Hello, Inc. (Hello)

Independent Data Communications Manufacturers Association (IDCMA)
Information Industry Association (IIA)
Institutional Communications Company (ICC)
International Business Machines Corporation (IBM)
International Communications Association (ICA)
Maryland People's Counsel (MPC)
MCI Telecommunications Corporation (MCI)
State of Michigan and Michigan Public Service Commission, Indiana Utility Regulatory Commission, and Public Utility Commission of Ohio (Ameritech States)
Minnesota Public Utilities Commission and the Minnesota Department of Public Service (Minnesota)
National Association of Regulatory Utility Commissioners (NARUC)
National Telecommunications and Information Administration (NTIA)
NCR Corporation (NCR)
New England Conference of Public Utilities Commissioners, Inc. (New England)
New Jersey Board of Public Utilities (New Jersey)
Noam, Commissioner Eli, of the New York State Public Service Commission (Noam)
Siemens Communication Systems, Inc. (Siemens)
Tele-Communications Association (TCA)
Telenet Communications Corporation (Telenet)
Teleport Communications Group (Teleport)
Telocator Network of America (Telocator)
Tymnet-McDonnell Douglas Network Systems Company (Tymnet)
U S Sprint Communications Company (US Sprint)
United Church of Christ, Office of Communication (UCC/OC)
Virginia State Corporation Commission (Virginia)
Western Union Corporation (Western Union)
Public Service Commission of Wisconsin (Wisconsin)

Parties Filing Motions to Accept Late Filed Comments

TCA
UCC/OC

Parties Filing Reply Comments

AICC
ANPA
Ameritech
ATSI
Bell Atlantic
BellSouth
California
CONAP
EDS
ESC
Hayes
ICA
Illinois Commerce Commission (Illinois)
Indiana Utilities Regulatory Commission, the State of Michigan, the Michigan Public Service Commission, and the Public Utilities Commission of Ohio (Ameritech states)

MCI
MPC
Missouri Public Service Commission (Missouri)
NARUC
New England
New Jersey
NTCA
NTIA
New York State Department of Public Service (New York)
NYNEX
Pactel
Shooshan & Jackson, Inc. (Shooshan & Jackson)
SWBT
Telenet
TCG
Telocator
US Sprint
US West
Videotex Industry Association (Videotex)
Virginia

Parties Filing Joint Supplemental Comments

ADAPSO, ADT, AICC, ALC, ANPA, API, ADCU, ATSI, CONAP, CCTU, CompuServe, CBEMA, Dun & Bradstreet, EDS, EMA, GE Communications & Services, Hayes, IDCMA, IIA, ICA), Mastercard International Inc. (Mastercard) , McGraw-Hill, Inc., New York Clearing House Association, TCA, Telenet, Tymnet, US Sprint and VISA U.S.A., Inc. (the Joint Parties)

Parties Filing Joint Motion to Accept Supplemental Comments

The Joint Parties

Parties Filing Oppositions to Motion to Accept Supplemental Comments

BellSouth
Pactel
SWBT

Parties Filing Oppositions to Supplemental Comments

NYNEX
SWBT

Parties Making Ex Parte Presentations

ADAPSO
Ameritech
ANPA
AT&T
Bell Atlantic

BellSouth
Dun & Bradstreet
GTE
IDCMA
IBM
MCI
NYNEX
ONA Task Force
Pactel
Rollins, Inc. (Rollins)
SWBT
Telenet
Tymnet
United Telephone System Companies
US West

APPENDIX B

USE OF THE COMMON ONA MODEL BY THE BOCS

1. Not all the BOCs adhere strictly to the common ONA model described in their Report No. 4 and summarized above in paras. 56-58. For example, US West says that the model "does not purport to represent an agreement as to how any particular company's plan would be designed or implemented."[1] Indeed, a review of various BOC ONA offerings shows that interpretations of the model diverge widely. Nevertheless, the BOCs carefully examine the common ONA model and relate their own concept of ONA network elements to concepts illustrated in the model. The treatment that each BOC gives the model and its network elements is described below.

Ameritech

2. Ameritech states that the ONA model that it has developed is central to the technical and business approach it takes with ONA.[2] This model consists of BSAs, BSEs, and CNSs.[3] A BSA, says Ameritech, constitutes the minimum necessary arrangement for the delivery of unbundled features to ESPs. It includes an ESP access link, features and functions for switching, and transport.[4] The access link, says Ameritech, consists of the facilities used to connect the ESP to its serving central office.[5] The features/functions element of the model consists of fundamental switching capabilities resident in the ESP's serving central office or a distant central office and includes the routing and processing capabilities associated with the provision of end-to-end communications. The transport element of the model, says Ameritech, connects the ESP's serving office to other offices where access to features/functions or end users is desired.[6]

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1 U S West Plan at 26.

2 Ameritech Plan at 26.

3 Id. at 25-33.

4 Id. at 26-28.

5 Id. at 27.

6 When the ESP and the end user are served from the same serving office, the transport element consists of an intraoffice connection. Id.

3. Ameritech states that its BSEs are optional "unbundled" switching features that are purchased by an ESP for use in offering an enhanced service.[7] BSEs are technically delivered to an ESP via an appropriate BSA.

4. Ameritech describes CNSs as optional features associated with an end user's line.[8] According to Ameritech, CNSs are now (or, for future services, will be) deployed over a large, existing customer base, and can be used for a variety of reasons, only some of which relate to enhanced services. However, Ameritech explains that while CNSs are useful in conjunction with many basic services, CNSs are particularly useful in facilitating the interaction between end users and an ESP's service. Examples of CNSs that Ameritech says it will make available upon initial ONA implementation are speed calling and call forwarding. CNSs, it says, will be purchased by end users or authorized agents of end users.

5. Finally, Ameritech states that "other network capabilities" are services that have broad application for a variety of service and customer types, and relate primarily to the transport of both basic and enhanced traffic over public, private, and hybrid networks. Ameritech says that these services are generally local exchange services offered in existing tariffs, and will not require changes as a result of ONA.[9] Ameritech does not specifically classify billing and collection as ancillary services and does not commit to providing them as part of its initial ONA offerings. Ameritech states that it is currently developing an interface "module" that will allow customers access to operations support systems (OSS). Ameritech says that it expects the interface module to be available, at least in pilot form, by the third quarter of 1989.[10]

6. Ameritech says that its BSAs, BSEs, and CNSs will meet the Commission's CEI requirements for unbundling, technical equality, access, and pricing.[11] In addition, Ameritech states that it is committed to the

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7 Id. at 28-29.

8 Id. at 29, 32.

9 Id. at 33; Ameritech Reply at 20. The Ameritech plan does not use the "ancillary" service category and labels services that do not fall within the ONA model as "other network capabilities". However, in its reply, Ameritech also describes these services as "ancillary services."

10 Ameritech Plan at 117.

11 Id. at 72-92.

nondiscriminatory offering of all services, including BSAs, BSEs, CNSs, and "other" services.[12]

Bell Atlantic

7. Bell Atlantic states that the BOCs developed the common ONA model to provide a basis for discussing ONA service offerings with the ESP industry.[13] The model, it says, is technologically flexible and describes the generic elements of any ONA connection to the BOCs' network.[14] Moreover, as technology changes, Bell Atlantic says that the model can be modified to include new interfaces available for network access and functional control. At present, says Bell Atlantic, the model serves to reflect standard network interfaces for ESP connections.

8. Bell Atlantic explains that its ONA model is comprised of components identified in the common ONA model. For example, Bell Atlantic states that BSAs, as described in the common ONA model, are the means by which it will provide network services to ESPs.[15] Bell Atlantic says that a BSE, also described in the model, is an optional network capability associated with a BSA to which ESPs may subscribe to meet their specific needs.[16]

9. Bell Atlantic states that CNSs will be available to end users as a means to reach ESPs.[17] Bell Atlantic says that it expects that many existing services such as call forwarding would fall into this category. A CNS, it says, would usually consist of the customer's local service, and could have several service options associated with it.[18] Finally, Bell Atlantic states that ancillary services, which it describes as "functions that are not basic network services" are available to ESPs.[19]

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12 Ameritech Reply at 19.

13 Bell Atlantic Plan at 6. Bell Atlantic states that such commonality was requested by ESPs.

14 Id.

15 Id. at 7. Bell Atlantic's description of a BSA is very similar to that of Ameritech. See id. at 7-8.

16 Id. at 10.

17 Id. at 11.

18 Id.

19 Id. at 11.

10. Bell Atlantic states that "the BSAs/BSEs [it] will deploy fully meet comparably efficient interconnection (CEI) requirements...."[20] However, Bell Atlantic does not make similar claims for its treatment of CNSs and ancillary services. Bell Atlantic states that while the Commission has defined billing as an unregulated service, it is nevertheless willing to work with any ESP to determine the feasibility of performing the service.[21]

BellSouth

11. BellSouth states that its ONA model consists of three parts: BSAs, BSEs, and CNSs.[22] Like other BOCs, BellSouth says that BSAs are the underlying connections of an ESP to and through the BOCs' networks, and should be considered the fundamental connection to the network.[23] BellSouth describes BSEs as technically defined capabilities that may or may not be selected in conjunction with a BSA.[24]

12. BellSouth says that CNS is the term it uses to describe the means for an ESP's customer to connect to the network.[25] ESP end users can order CNSs through BellSouth general local exchange tariffs, while ESPs can order such services through BellSouth's special ONA tariff if the ESPs have agency agreements with affected customers.[26]

13. Finally, BellSouth states that it may offer services that do not fall under the ONA model but that may be useful to ESPs. Such services, it

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20 Id. at 64.

21 Id. at Attachment B at 83.

22 BellSouth Plan at 7-8. According to BellSouth, the model has been structured so that it is "technology independent" to accomodate a variety of existing and future architectures.

23 Id. at 8-9, 12.

24 Id. at 9.

25 BellSouth says that it is expected that many existing services would fall into this category. However, it says that it would usually consist of an ESP's customer's local service such as a business or residence line, and could have several service options associated with it. Id.

26 Id. at Attachment Q at 2 (Sections A32.2 G, A32.4).

says, have been called "ancillary" and could include, but are not limited to, services such as billing.[27] BellSouth says that it will only consider providing ancillary services on a "specific request basis" because ancillary services are external to ONA.[28] BellSouth does not explicitly classify OSS as an ANSs.

14. BellSouth does not explicitly state that any of the network components of its model will fully meet CEI requirements. However, it generally discusses how its network components will comply with the nine CEI parameters.[29]

NYNEX

15. NYNEX states that its ONA model describes the technical basis for its plan.[30] According to NYNEX, a BSA is a combination of network components including a communications path, network functions, and network features essential to the provision of a communications service.[31] NYNEX, like other BOCs, provides different configurations of essential network components as alternative capabilities.

16. A BSE, says NYNEX, is a network function or feature that is optional to a BSA.[32] According to NYNEX, "BSAs and BSEs are network capabilities to which ESPs would normally subscribe or to which end users would subscribe for no purpose other than accessing an ESP."[33] Thus, NYNEX says, these capabilities are intended for use by ESPs, but customers other than ESPs may also subscribe to them.

17. According to NYNEX, CNSs are services to which end users would subscribe and which, in conjunction with compatible BSAs/BSEs ordered by ESPs, would enable end user-to-ESP communications.[34] Ancillary services, says NYNEX,

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27 Id. at 10 and Attachment C at 2.

28 Id. at Attachment C at 2.

29 Id. at 44-75.

30 NYNEX Plan at 17; see also id. Appendix B(3).

31 Id. at 17.

32 Id.

33 Id.

34 NYNEX states that many existing services, e.g., business or residence dial tone lines would fall into this category. Id. at 18.

are services that, while they do not fall under the ONA umbrella, may be useful to ESPs.[35] NYNEX states that it will offer billing and collection as an ANS.[36] NYNEX says that it recognizes that its customers would like to access and use network management capabilities, i.e. OSS, to gain greater control over their use of basic telephone services and capabilities. NYNEX says that it will develop its network in a manner that provides customers with the option to control their own network services and resources through access to OSS.[37]

18. NYNEX states that its plan "fully satisfies the Commission's CEI parameters for [its] initial BSAs and BSEs...."[38] NYNEX does not comment on whether its future CNSs or ancillary services will also satisfy these parameters.

Pactel

19. Pactel states that it has "embraced the national model as [its] own," in the belief that a set of definitions will facilitate compliance with CEI requirements and encourage dialogue with the ESP industry.[39] Pactel says that the main concept depicted by the model is the technical hierarchical relationship between many of the functionalities that ESPs have requested and their basic access to the network. Like Bell Atlantic and BellSouth, Pactel says that the model is intended to be technology independent. Pactel claims that the model can also be used as the foundation for the tariff structure of ONA services.[40]

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35 Id. at 18.

36 Id. at 33-34.

37 NYNEX states that it foresees a network that will expand its customers' ability to maintain their own network through access to Customer Access Management (CAM) capabilities. The CAM concept, it says, would provide its customers access through a single terminal that would service as a gateway to an array of capabilities including service rearrangement controls, service order entry functions, diagnostic and testing facilities, and circuit, traffic and billing information. Id. at 114.

38 Id. at 70.

39 Pactel Plan at 19.

40 Id. at 20.

20. Pactel reiterates that the common ONA model consists of three parts: BSAs, BSEs, and CNSs. Pactel states that a BSA is the combination of elements underlying the connection of an ESP to and through the BOCs' network to provide an ESP's service.[41] Pactel says that BSEs are optional network capabilities associated with a particular BSA that connects an ESP to its customer. Pactel says that for technical reasons, some BSEs will not be available with all BSAs.[42]

21. CNSs, says Pactel, are basic services that an end user purchases, such as a subscriber access link, to facilitate provision of an enhanced service.[43] Pactel says that it may offer a CNS under different tariff provisions than a BSE, which may include different rates, terms, and conditions than a BSE.

22. Pactel says that ancillary services are either "outside" the network, or are services that are not technical capabilities or functions of the network.[44] For example, different types of OSS, it says, are built individually to solve individual business problems. Pactel says that universal use of existing kinds of OSS would present security and partitioning problems.[45]

23. Pactel states generally that BSEs meet the requirements of the Computer III orders.[46] Pactel does not make a similar claim for any other network element. In particular, Pactel says that it may offer certain services as CNSs under different tariff provisions and subject to different rates, terms, and conditions from those applicable to the same services when offered as BSEs.[47] Pactel states that it does not believe that the price, terms,

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41 Pactel says that the BSA includes an access link, features and functions associated with that access link, and transport. Id. at Appendix E.

42 Id. at 20.

43 Id. at Appendix E.

44 Id. Pactel says that it will offer many ancillary services once technical and security issues are resolved. Examples of such services include collocation, expedited repair, billing and collection, customer information, and OSS. Pacific Reply at 17.

45 Id. at 32 n. 21. See also Pactel Reply at 17.

46 Pactel Plan at 38-49.

47 Pactel says that CNSs are not BSEs because CNSs are not designed solely to meet ESPs' needs. A few CNSs, it says, will be offered as BSEs or BSAs to

and conditions of ancillary services must be equal between other ESPs and the enhanced services operations of Pactel.[48]

SWBT

24. SWBT states that it developed its ONA model based upon "an understanding of the enhanced service applications that ESPs wished to make available in the marketplace."[49] SWBT identifies four discrete categories of ONA-related services: BSAs, BSEs, CNSs, and ANSs.[50]

25. SWBT states that a BSA is the underlying connection of an ESP to and through the BOCs' network.[51] SWBT says that BSEs are optional network functions that ESPs do not need for an operational basic service, but which, when associated with BSAs, provide additional utility to ESPs.[52] SWBT states that ESPs can use any available BSEs and that every BSE will be available with every BSA that is technically capable of supporting it.[53]

26. CNSs, says SWBT, are those services that it offers to end users rather than to ESPs.[54] SWBT says that CNSs may only be ordered by ESPs if the

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accomodate ESP requests. Pactel Reply at 13.

48 Pactel Reply at 17 and Pactel Plan at Appendix E.

49 SWBT Plan at 14.

50 Id. at 18.

51 SWBT says that its BSAs conform to the generic BSA categories of the common ONA model. SWBT Plan at 19. Generally, as in other BOC plans, BSAs consist of an access link, the features/functions associated with that access link at the ESP's serving office and/or other offices, and the transport/usage (dedicated or switched) within the network that completes the connection from the ESP to its customers' serving offices, to capabilities associated with the customers' CNSs, or to the customer premises in certain dedicated service arrangements. Id. at 19-20.

52 Id. at 23.

53 Id. at 24. However, SWBT proposes a special state tariff for BSAs and BSEs.

54 Id. SWBT states that CNSs are essentially local services that are tariffed today within state general exchange service tariffs. All new CNSs, it says, will be offered through those state general exchange tariffs. Id. at 26.

ESPs are ordering for their clients pursuant to written authorization from those clients.[55] This arrangement, says SWBT, will ensure that neither its own enhanced service operation, nor any other ESP, can gain unauthorized control of critical end-user line capabilities that may relate to the provision of enhanced services.[56] Otherwise, says SWBT, an ESP could order CNSs to be activated on an end-user's line without the approval of the end-user and possibly cause complications with, or even interruptions of, the end-user's use of other enhanced services or basic exchange telephone service. SWBT claims that the use of such agency arrangements will not be administratively burdensome for ESPs.[57]

27. SWBT defines ancillary services as optional services available to ESPs to support and complement ESP provision of enhanced services that cannot be included in the BSE category because of the BSE definition. SWBT says that if a capability is either detariffed or is not directly related to the technical operation of a BSA, it falls within this category. SWBT says that it will offer it on a totally nondiscriminatory basis and that all ESPs will be charged the same rate for these services as SWBT enhanced services operations.[58] SWBT says that it does not "currently foresee" direct real time operations access to its network equipment. It says that specific ESP needs have not been sufficiently defined to support OSS equipment.[59]

28. SWBT states that its "BSEs ... will be subject to the Commission's CEI-type safeguards."[60] While it does not state explicitly

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55 SWBT says that although CNSs will not be considered as part of the ESP's ONA Access Arrangement, if an ESP wishes to order a CNS for its own use as an end user -- not for its use in providing its enhanced services to its clients -- it will be free to do so. If ordered in connection with enhanced service provisioning via the ESP's BSA, the feature will be provided as a BSE. Id.

56 Id. at 25. SWBT says that this approach should support our desire to give end users as much flexibility as possible.

57 Id. For example, it states that ESPs may sign "blanket" agency contracts with it similar to those that have been in use for customer premises equipment (CPE) vendors and carriers since 1984. SWBT says that ESPs will have the flexibility to fashion and market total end-to-end enhanced service to their clients..

58 Id. at 27.

59 Id. at 152.

60 Id. at 80 n. 55. SWBT claims that core basic services that are truly

whether its BSAs will be also be subject to these rules, SWBT generally describes how both its BSEs and BSAs -- as "building blocks" for enhanced services -- will comply with CEI for unbundling, technical equality, and access.[61] SWBT says that CNSs do not need CEI-type safeguards to ensure nondiscriminatory access by ESPs because CNSs are not provided exclusively or even primarily as basic service building blocks for use with enhanced services.[62] SWBT claims that neither the BOC nor the ESP would necessarily order and obtain such services for the end user, so that "ONA conditions most often would be unnecessary to ensure competitive parity."[63] SWBT says that its ancillary service offerings will be fully operational and available to enhanced service providers on the same date as the ancillary services will be available to SWBT's enhanced service operation, on the same terms and conditions, and at the same prices.

US West

29. US West states that its plan incorporates aspects of the common ONA model.[64] For example, US West explains that the description of BSEs used in the common ONA model as "optional network capabilities associated with a basic serving arrangement" is compatible with the definition of BSEs it uses in its plan -- central office features or functions associated with the ability of an enhanced service provider to provide unique services to its customer base.[65] US West says that BSEs will be accessible via any access arrangement lawfully available to ESPs for use in providing a particular

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"building blocks" for enhanced services, like BSAs and BSEs, should be treated differently, for regulatory purposes, than those services that are operational or administrative "adjuncts" to BSAs and BSEs and for which competitive alternatives may exist.

61 Id. at 112-136.

62 SWBT notes that CNSs are associated with local exchange customer lines generally employed by the end user for accessing enhanced as well as non-enhanced service applications. Id. at 79.

63 Id. at 80. SWBT says that precisely because it cannot know which end users utilize their local basic service to access enhanced services, it is impossible for it to discriminate among customers of ESPs in providing service.

64 U S West Plan at 26-29.

65 Id. at 28.

service and technically compatible with the BSE.[66] US West does not create any new or separate access arrangements to be offered as BSAs.[67]

30. US West says that CNSs essentially complete the access connection between the enhanced service provider and its customer. US West relates its provision of CNSs to its compliance with the equal access requirements of the CEI parameter denoted "end-user access."[68] US West explains that "end-user access" means that, if a carrier-based enhanced service is available to end users through a special network capability, that network capability must be available to the end-user customers of the carrier's enhanced service competitors.[69] US West adds that such equal end-user access gives all enhanced vendors an opportunity to structure their operations in a manner in which customer access is equal, but it does not guarantee such equality regardless of how ESPs configure their networks.[70]

31. US West says that ancillary services are basically services that are provided by telephone companies that do not involve the transmission

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66 U S West also discusses how its BSEs will comply with CEI requirements for unbundling, technical equality, and access. Id. at 335-370.

67 Id. at 27.

68 See Phase I Order, 104 FCC 2d at 1041, para. 162.

69 US West Plan at 28-29, citing Phase I Order, 104 FCC 2d 958, 1035-1043 at paras. 147-166.

70 End-user access is not a guarantee or an offer to make network modifications, regardless of costs, to increase the ease of end-user access to a particular enhanced vendor. For example, US West notes that data over voice (DOV) transmission, which we have mentioned as an "end user" function, requires signal regeneration within three miles or it suffers degradation. US West states that if DOV end user access were used in the provision of a US West enhanced service, customers of DOV access would be able to have their data transmissions delivered to competitive ESPs on a basis equal to that obtained if the data were delivered to the US West enhanced service. However, says US West, a vendor with only a single node would not be able to insist that a customer more than three miles from its node -- but within three miles of a US West or other competitive node --be given free regeneration service under the "guise" of equal customer access. Id. at 348-349.

of messages on a common carrier basis.[71] Often, says US West, these services have been detariffed or deregulated. For example, US West says that it does not consider a request for access to OSS as a request for a basic service element.[72] US Wests says that while OSS is necessary to the internal operation of the exchange network of US West, it is not part of the network itself, and therefore is not offered as a regulated exchange service. US West indicates that it will attempt to accomodate enhanced service providers needs that fall outside of its plan arrangements.[73]

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71 US West Reply at 77.

72 Id. at 317.

73 US West states that where "requests represent a desire for new methods of obtaining network information and or doing business with US West which fall outside the penumbra of the plan, US West will work with those requesting Enhanced Service Provider's in the development of US West services to accommodate their needs." Id. US West says that extreme care will need to be exercised in dealing with requests for access to OSS because of the MFJ's prohibition against the offering of information services by the divested BOCs. Thus, it says, even if a realistic technical and market response to a request for access to a BOC database could be developed, the information services restriction might be read as precluding the offering of such access to the public. Id.

APPENDIX C

BOC APPLICATION OF SELECTION CRITERIA

A. Ameritech

1. Ameritech applied a screening process based upon the Phase I Order selection criteria to the list of 157 NC requests. Ameritech determined that it could feasibly offer 64 NCs by September 1, 1989, its selected target date, and offer 21 BSEs initially.[1] Ameritech claims that ESPs individually, and as a group, were reluctant to provide forecasts of their projected BSE usage, which made the task of assessing demand and utility for BSE candidates difficult. Ameritech reports that the problem of forecasting usage was compounded by the fledgling nature of the ESP industry and the diversity of applications for enhanced services that Ameritech received.[2] Therefore, in order to define demand and utility expectations for BSEs without the availability of demand estimates from the ESPs themselves, Ameritech states that it had to develop an analysis process that used a wide variety of research and analytical tools. For example, it used secondary data searches of enhanced service applications projections by ONA planners; application-specific input from key Ameritech marketing personnel familiar with the ESP marketplace; and a modeling exercise conducted by a second industry consultant and designed to incorporate all input into a consolidated projection of BSE demand.[3]

2. Ameritech concludes from its market demand analysis that the actual demand for BSEs will be determined by a number of factors, including: (a) ESP development of the underlying applications marketplace upon which BSE demand depends; (b) working relationships between Ameritech and ESPs; and (c) consumer acceptance of enhanced services.[4] Finally, with regard to geographic

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1 Ameritech Plan at 22. In addition to the 21 BSEs Ameritech will offer initially, Ameritech will offer BSAs, CNSs, and currently tariffed services. Thus, Ameritech will offer a total of 55 NCs initially. See Appendix D, Table 1, infra.

2 Ameritech Plan at 34.

3 See id at 34-37, Appendices 6, 7. Appendix 6 tabulates 27 secondary data sources, which were used to make demand projections. Quantitative data are not, however, presented. Appendix 7, a utility analysis, contains a chart that maps 21 BSEs into 19 discrete ESP market applications.

4 Id.

considerations, Ameritech says that it engaged two independent firms to produce aggregate, region-wide market demand estimates for BSE and CNS candidates. Ameritech indicates that due to the limited availability of historical demand data for enhanced services, these market research results also proved inconclusive in projecting BSE or CNS demand on a location-specific basis within the Ameritech region.[5]

3. Ameritech also applied a technical feasibility analysis to the BSE requests it received, and states that each of its 21 initial BSE offerings has already passed a technical availability screen and is available in some areas using a combination of technology that currently exists or is expected to exist in Ameritech's networks as of September 1, 1989, Ameritech's deadline for implementation.[6] It also submits no quantitative data to indicate how the costing feasibility of accepted and rejected candidates was determined.

4. Ameritech states that it is committed to supporting the enhanced services industry in a manner that ensures the long-term viability and attractiveness of its networks to the ESPs. Ameritech says that it seeks to establish cost-based tariff prices for its BSEs in accordance with this Commission's Part 69 costing principles.[7]

B. Bell Atlantic

5. Bell Atlantic reports that it derived input data for its market demand analysis based on contracted research by Shooshan and Jackson and Link Resources, the national ONAFs, and its regional forum.[8] Bell Atlantic screened service requests under two criteria in order to determine priority: aggregate ESP industry demand and high priority in a given enhanced service industry segment. Bell Atlantic does not, however, submit quantitative data to support its priority assignment decisions. With regard to utility, "Bell Atlantic presumed that a requested service met the Commission's utility criterion if it had been requested by an existing ESP, or a non-ESP that had a reasonable application for a potential or existing enhanced service."[9]

6. A Bell Atlantic task force, established in 1986, analyzed technical feasibility. It evaluated each NC request in terms of whether:

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5 Id. at 64.

6 Id. at 38.

7 Id. at 37.

8 See Bell Atlantic Plan at 17-20.

9 Id. at 17.

(a) the capability is currently available in network; (b) the capability is in planning phase; or (c) major development would be required. Bell Atlantic compiled the results into two ONA status reports, which it mailed to industry participants in June/July 1987.[10]

7. Bell Atlantic then performed a cost feasibility analysis of those network capabilities that passed the "technically feasible" test. "Where alternative network solutions appeared to meet an ESP need, Bell Atlantic examined each to determine the most cost effective method of meeting a request."[11] Cost analysis parameters included equipment investment, engineering and installation, and other associated expenses. As in the case of the market demand analysis, Bell Atlantic did not present quantitative data in support of its cost feasibility decisions.

C. BellSouth

8. The results of the analysis of 157 requested capabilities by each of the four criteria appear in Attachment L of BellSouth's plan.[12] In addition, BellSouth claims that "inherent in the analysis of capabilities under [this Commission's selection] criteria" is the consideration of "sound business principles."[13] BellSouth states that it contracted with an independent telecommunications consulting firm, JRH Associates, Inc., to conduct market research in two phases -- interviewing members of the enhanced service industry and validating the results of those interviews by talking with end user customers.[14] BellSouth also claims to have made extensive use of secondary market research.[15] On the basis of this research, it uses a scale from 1 to 5 to indicate expected demand, with the highest rating given to BSEs with demonstrated customer demand, such as extensive use of an established offering, and the next-to-highest rating given to BSEs for which market research alone indicates a high market potential.[16]

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10 These reports are included in Appendices C and D of the Bell Atlantic Plan.

11 Id. at 20.

12 Neither the demand nor the costing analysis are accompanied by corroboratory quantitative data. Market demand is evaluated on a relative 1-5 scale and costing feasibility is assessed on a "Yes"-"No" basis.

13 Bell South Plan at 26-27.

14 Id. at 23-25.

15 Id. at 26.

16 Id. at 34-35. See also Att. L for a tabulation of the assignment of

9. With regard to its utility analysis, BellSouth states that it independently identified a number of basic network capabilities, such as interoffice transport and local channels, necessary to provide network utility to enhanced service providers.[17] In general, it claims that its utility analysis was based on a comprehensive review of ESP need statements developed directly from ESP descriptions of desired network functionality. It then rated the utility of BSEs to enhanced service providers on a three-point scale that reflected market demand.

10. BellSouth based its working definition of "technical feasibility" on our requirement that all initial BSEs must be available to the public within one year of approval of an ONA plan. It assumes that its plan would be approved by September 1988, making the initial implementation deadline September 1989.[18] It indicates that its major effort at technical feasibility analysis took place at a national level, with the endorsement and participation of all of the BOCs, through the TAG and an ONA Task Force Technical Subcommittee.[19] BellSouth states that it supplemented this national technical feasibility analysis work by expanding the number of switch types addressed in the analysis.[20] Its plan contains several attachments that document the results of its technical feasibility analysis.[21]

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these assessments to requested capabilities.

17 Id. at 26-36.

18 Id. at 28.

19 Id. at 31. See also Sec. IV.B.2, supra.

20 Id. at 32.

21 Attachment O of BellSouth's plan contains a questionnaire that the BOCs conveyed to AT&T and Northern Telecom Inc., to validate findings on their equipment. Detailed results of BellSouth's own technical analyses are shown in the 551-page Attachment C, which includes, for each requested capability: a definition; a statement of the use to which enhanced service providers see themselves putting the requested capability; the source of the request; a summary of the results of BellSouth's technical analysis of availability, support, whether the requested need can be met, interactions with other services, and other limitations; a technical summary of the conclusion reached as a result of BellSouth's technical feasibility analysis; any current tariff information that is available on the requested capability; reasons, if applicable, for rejecting a particular capability for market demand or enhanced service provider utility reasons; and a conclusion. Attachment L summarizes the results of the Attachment C analysis in a columnar table.

11. With regard to costing feasibility, BellSouth states that cost will seldom, if ever, be the reason BellSouth will not offer a capability but that, in some cases, the unbundling of specific capabilities may be so costly that market demand from enhanced service providers will be diminished or eliminated.[22] It assigns a "No" in its costing feasibility column if costing of a capability cannot be completed using procedures or cost models presently in existence at BellSouth.[23]

D. NYNEX

12. NYNEX describes a Service Evaluation Process that paralleled its Market Outreach effort, beginning as soon as it identified the business needs of ESPs.[24] Specifically, in May 1987 its technical team initiated a process designed to match business needs with potential NYNEX services in the form of key BSEs or BSAs, CNSs, or ANSs that could probably be offered within one year of plan approval. NYNEX claims that its evaluation team reviewed all ESP requests, separating requests relating to policy and business issues from those relating to service or product requests. NYNEX states that where necessary, it returned to the ESP community for clarification on various requests.[25] NYNEX states that it devised its Service Evaluation Process to consider potential products and services "under the following four criteria: 1) technical feasibility, 2) market demand assessment, 3) product review process, and 4) operational feasibility."[26]

13. NYNEX selected Link Resources Corporation to assist it in its market demand analysis. NYNEX reports that Link contacted key players in each industry (derived from the ESP request data) to measure the market demand for each potential service. NYNEX notes that because product and pricing data were incomplete at the time the market demand research was conducted, the research produced only "macro order of magnitude demand profiles" for each potential service.[27] Although the detailed data required for the discrete deployment of specific ONA services will have to be developed with ESPs after

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22 Id. at 36.

23 Id.

24 See NYNEX Plan at 44-53.

25 See id., Appendix C, Section 9 (correspondence and other information received from the industry.)

26 Id. at 45.

27 Id. at 51.

the filing of its plan, NYNEX claims that the macro level of demand for the potential NYNEX ONA products and services that was identified in the Outreach Process indicates that demand will be sufficient in most cases to justify making such services available. With regard to utility considerations, NYNEX states that it translated the needs of the ESPs to specific applications of the NYNEX ONA Model.[28] Once user needs were thus translated, a determination was made whether an ESP's functional need could be served by a BSA in the circuit switched, packet switched, or direct connect architecture.

14. NYNEX indicates that its technical feasibility evaluation consisted of six discrete areas of investigation focused on whether the feature can be (a) made technically available in the network; (b) technically unbundled; (c) ordered; (d) tested and maintained; (e) billed; and (f) provided economically.[29] ITV assessed each area prior to considering any requested feature for availability. To be included in the initial set of ONA products and services, a feature had to be capable of meeting these six criteria within one year of ONA Plan approval.

E. Pactel[30]

15. To determine market demand, Pactel states that it established a process to analyze industry requests for BSEs and chart each request and that it solicited and obtained input from the industry. It considered whether sufficient demand would exist to price the BSE at a level that would cover costs. Pactel does not offer any corroborating data pertaining to the demand analysis. In addition, Pactel does not explicitly discuss the manner in which it derives cost and then applies the cost feasibility criterion; nor does it offer any quantitative data related to the process of matching potential revenues to costs. With regard to the utility criterion, Pactel does not explicitly describe any process by which it would make an independent

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28 Id. at 46-47.

29 NYNEX has apparently chosen to combine the cost feasiblity criterion and the technical feasibility analysis. NYNEX states that to determine the cost of a feature, it was necessary to identify the specific elements of hardware and software used to produce it. NYNEX says that in general, features that could be added to the existing network with software solutions and/or minimal hardware modifications are more likely to pass the economic feasibility test than would features that require major new network software and hardware systems. NYNEX states that detailed cost evaluations will be completed as the product planning process for each ONA product and service continues to be developed. See NYNEX Plan at 50-51.

30 See Pactel Plan at 29-30.

evaluation of a BSE's utility to enhanced service providers, other than by determining the level of market demand for BSEs in the manner described above.

16. To determine technical feasibility, Pactel states that it categorized requests for network capabilities into five different categories, depending upon when they could be provided, given what is currently known about the network. Pactel used the following categories: "existing services; services available by September 1, 1989; futuristic services; services outside the scope of the ONA framework; and requests not fully understood."[31]

F. SWBT

17. SWBT describes its approach to market research and demand and utility analysis in the following manner.[32] First, it identified potential users, which would include ESPs as well as entities with internal applications. It then used formal statistical sampling procedures to identify a representative group,[33] and then analyzed the samples to determine "demand utilities and price sensitivities for various BSEs, based on a series of respondent ratings of various combinations of BSEs and basic service."[34] The results of the analysis yielded estimates of potential revenue by geographical composition.

18. SWBT states that its determination of technical feasibility was guided by the constraint of our one-year implementation deadline. As a consequence, SWBT assumes that its initial ONA offerings will use existing technology. SWBT essentially asked itself whether a given NC is: providable, orderable, testable, and maintainable.[35] The results of this evaluation are summarized in Appendix 2A of the SWBT plan.[36]

19. In conducting its cost feasibility studies, SWBT notes that it screened the candidate NCs for inclusion in the cost feasibility determination

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31 Id. at 29.

32 See SWBT Plan at 30-33, Appendixes 3A, 3B, 26.

33 This group was then queried by means of a questionnaire, which included descriptions of proposed new services, their application, and proposed pricing. See id., App. 3B.

34 Id. Appendix B at 2.

35 Id. at 33-35.

36 This tabulation is a summary of a technical analysis effort that was applied to 174 NC requests.

according to five jointly applied criteria, i.e.,whether: (a) the NC uses existing technology; (b) the incremental investment, if any, would be minimal; (c) the NC is an existing feature or is similar to an existing feature; (d) the level of expected demand would be adequate; and (e) the costs could be developed under existing methods.[37] In addressing existing methods, SWBT states that it will use the long-run incremental cost methodology, except for Kansas, which requires fully distributed costs, and except for FCC access tariffs, which are also based upon fully distributed costing methodologies.[38] The results of the cost studies are summarized in Appendix 15B of SWBT's plan.[39]

G. US West

20. US West states that it evaluated market demand for BSEs through qualitative and quantitative market research. It conducted qualitative research on an informal basis through meetings of the US West ONA product marketing staff with ESPs and industry groups, and used qualitative information to form a basis for identifying potential customers and possible ESP offerings.[40] The quantitative phase of the market research was designed to measure the value and utility of BSEs to ESPs and thus to estimate their demand for BSEs. US West explains that its research began with the development of product concepts developed from the capability requests of ESPs that US West considered technically feasible and that could be implemented within one year of anticipated plan approval. US West says that these product concepts were then evaluated by a selected sample of potential customers chosen from the following four customer groups: alarm and security companies, telemessaging service providers, value-added network providers, and information services providers. According to US West, customer expressions of value and demand for the proposed product concepts formed the basis for screening potential product offerings.[41]

21. US West states that it evaluated potential product offerings according to three key criteria: (a) usefulness; (b) provider (ESP) demand;

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37 Id. at 35.

38 Id.

39 SWBT notes that the results of Appendix 15B "are from previously completed cost studies that were used as surrogates for certain BSAs/BSEs. New cost studies specifically for the BSAs/BSEs filed in this proceeding have not been developed due to time constraints." Appendix 15B, cover.

40 US West Plan at 60-61.

41 Id. at 61-62.

and (c) end user demand. US West measured usefulness by describing a proposed product and asking respondents to rate the usefulness of a product for their business. It measured ESP demand by giving a price projection for a product and asking how likely respondents would be to subscribe to a product. US West says that it estimated end user demand by asking representatives of customer groups how likely their subscribers would be to buy a service at a given price.[42]

22. According to US West, it maintains detailed results of its market research, but did not include them in its ONA plan filing. US West states that it would be willing to share these studies with this Commission on a proprietary basis, but will not make them public. According to US West, its research provides significant detail relating to the potential demand for, and use of, basic network capabilities and services that would give a significant competitive advantage to other providers of competitive basic services. US West says that because its plan does not deny any ESP request for a prospective BSE solely on the basis of these studies, there is no need to submit detailed market data as part of this filing.

23. With regard to the determination of technical feasibility, US West has established five categories for candidate requests: (a) the service is available today and offered under tariff or on a contract or list basis; (b) the technical capability exists in the network, but is not currently offered as a product or service; (c) the service is technically feasible with minor hardware or software modification by the manufacturer; (d) the service is technically feasible with major hardware or software modification by the manufacturer; and (e) the service is not technically feasible based upon current embedded technology or planned future central office technology at this time.[43]

24. US West states that, in general, it will offer a feature or function if sufficient demand exists to justify its cost (including development costs). In addition, US West notes that since the provision of specific NCs depends on the type of switching technology that is installed in a given end office, the geographic availability of a given NC depends as much on US West's switch deployment schedules as on market demand for an NC itself.[44]

25. US West states that although it has derived cost feasibility from multiple perspectives, market demand forecasts are the primary

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42 Id. at 63.

43 Id. at 53-54.

44 Id. at 53-54.

determinant. It considered the following factors in its evaluation of cost feasibility: (a) willingness of market to pay for the requested BSE (what the ESP considers a reasonable price for the requested service); (b) potential life cycle for the requested BSE (whether the BSE has the potential to be replaced by newer technology within the first year or so); (c) plant investment required (whether the plant investment may be reused over time to provide other products or services with sufficient growth in demand for the general rate base); and (d) the deployment timetable (whether the requested technical capability can be deployed within the customer/patron "market window" period, i.e., whether the service can be deployed while the customer still needs it and is willing to pay for it).[45] US West concludes that "a careful and thorough analysis of the costs to provide...BSEs, along with the demand and willingness to pay for them... indicates the feasibility of providing these services in each geographic market."[46]

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45 Id. at 57-58.

46 Id. at 58-59.

APPENDIX D

INITIAL DEPLOYMENT OF ONA OFFERINGS

Table 1

# of NCs Deployed by Each BOC (Deployed & of Total)

Ameritech	55 (47%)
Bell Atlantic[1]	58 (49%)
Bell South	56 (47%)
NYNEX	53 (45%)
Pactel	54 (46%)
SWBT	49 (41%)
US West	54 (46%)

Source: AT&T Comments, Appendix C and Commission staff analysis

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1 These data are derived from the ONA plans of the BOCs. In its reply, Bell Atlantic noted the addition of 18 new NCs. See supra note 71.

Table 2

Deployment of NCs by Region

Number of NCs Available in:

All 7 Regions	29
6 of 7 Regions	12
5 of 7 Regions	5
4 of 7 Regions	6
3 of 7 Regions	10
2 of 7 Regions	9
1 of 7 Regions	10
Total	81

Number of NCs Not Offered in Any Region: 37

Grand Total 118

Source: AT&T Comments, Appendix C, Commission Staff Analysis

Table 3

Number of Useful NCs[2]

ESP Sector	Among 118 (list total)	Among 29 (7 Regions)	Among 37 (not offered anywhere)
Tel. Ans.	70	14	26
Alarm	47	13	14
VAN	85	23	28
Data Base	64	18	21
Transaction	78	20	28

Source: Bell Atlantic ex parte filing and Commission Staff Analysis. See letter from Donald E. Lavin, Bell Atlantic, to H. Walker Feaster, III (filed June 30, 1988).

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2 The entries in this table signify, for example: (a) among the 29 NCs that are offered in all regions, 14 are useful to the Telephone Answering sector, etc. and (b) among the 37 NCs that are not available in any jurisdiction, 26 of these would be useful to the Telephone Answering Sector.

Table 4

22 NCs that Cannot be Deployed Immediately

ISDN/IN2/FNSI Related (10 NCs):[3]

BCR # 50, B-Channel switched and dedicated access; #51, D-Channel data delivered on B-Channel; #52, Multiple D-Channels on B-Channel; #53, ESP access to D-Channel signaling; #54, FN/SI; #55, Service Control Point databases; #57, Access to future intelligent functions of ISDN; #70, Derived channels compatible with ISDN; # 97, Remote access to user programmable functions (packet); # 102 Network control by customer from customer premises.

CCS7 Related (5 NCs):[4]

BCR #64, CCS7 access; #65, dynamic channel allocation; #105, calling party name; #109, Delivery of Class Marks; #110, User ID associated with calling number.

Technological (7NCs):

BCR #s 85-86, user initiated diagnostics; #91-94, DTMF options; #103, real time traffic data.

Source: Commission Staff Analysis

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3 These NCs are relevant only if either ISDN, IN/2, or FN/SI is already in place. ISDN is now in a limited field trial phase, and IN/2 and FN/SI are still very much in the conceptual phase.

4 At the present time CCS7 is almost completely deployed in the AT&T interexchange network. The RBOCs on the other hand continue, mostly, to use inband signalling systems. Without CCS7 deployment in the RBOC regions, these features are either impossible to achieve, or can only be achieved with difficulty.

APPENDIX E

ANALYSIS OF ONA OFFERINGS OF BOCS

Table 1 -- NCs Provided in All 7 Regions

NC#	NC Name	AMT	BA	BS	NYN	PAC	SWB	USW
1	CF/BY/DA	CNS	BSE	BSE	BSE	CNS	CNS	BSE
6	Activ. CFV with Call Comp.	CNS	TRF	BSE	BSE	CNS	CNS	BSE
10	CF/DA Var. Ring	CNS	BSE	BSE	BSE	CNS	CNS	BSE
13	SMDI	BSE	BSE	BSE	BSE	BSE	TRF	BSE
16	Speed Call	CNS	TRF	BSE	BSE	CNS	CNS	BSE
19	Call Dist functions	BSE	BSE	BSE	BSE	BSE	BSE	BSE
22	Call # I.D.	BSE	BSE	TRF	BSE	BSE	A/E	BSE
25	Multiline Hunt Grp	BSE	BSE	BSE	BSE	BSE	BSE	BSE
26	Unlimited Size Hunt Grp	BSE	BSE	YES	BSE	BSE	BSE	BSE
30	Trunk Side Access	BSA	TRF	BSA	BSA	BSA	BSA	TRF
33	Trunk Make BY	BSE	BSE	TRF	BSE	BSE	BSE	BSE
34	Message Wait	E/C	BSE	BSE	BSE	BSE	BSE	BSE
36	Make BY/Night Transfer	BSE	BSE	BSE	BSE	BSE	BSE	BSE
37	Faster Sig. on DID Trk	BSA	BSE	BSE	ALT	BSA	BSA	TRF
47	X.25 Int.	BSA	TRF	BSA	ALT	BSA	BSA	TRF
48	X.75 Int.	BSA	TRF	BSA	ALT	BSA	BSA	TRF
71	Digital PL	TRF	TRF	TRF	BSA	BSA	BSA	TRF
72	Diag. Channel on DSO	TRF	BSE	TRF	BSE	BSE	BSE	TRF
75	Broadband (analog video)	TRF	TRF	TRF	BSA	BSA	BSA	TRF
76	Reconfigure NWs	YES	BSE	BSE	BSE	BSE	BSE	BSE
77	Route Diversity	YES	BSE	BSE	BSE	YES	BSE	BSE
78	Auto Protection SW	TRF	BSE	BSE	BSE	BSA	BSE	BSE
79	PL Conditioning	TRF	BSE	TRF	BSE	BSE	BSE	TRF
88	Bridging	TRF	BSE	TRF	BSE	BSE	BSE	TRF
95	Multiple C/F	CNS	BSE	TRF	BSE	BSE	CNS	BSE
112	Close User Grop (Packet)	E/C	BSE	BSE	BSE	BSE	BSE	BSE
113	Fast Select (Packet)	E/C	TRF	BSE	BSE	BSE	BSA	BSE
114	Hunt Grp (Packet)	BSE	BSE	BSE	BSE	BSE	BSA	BSE
115	Call Redirect (Packet)	BSE	BSE	BSE	BSE	BSE	TRF	BSE

LEGEND:

For NCs Offered

BSA	Offered as BSA
BSE	Offered as BSE
CNS	Offered as CNS
ANC	Offered as ANC
LT	Alternative of BSA
E/C	Offered as BSE & CNS
A/E	Offered as BSA & BSE
TRF	Currently tariffed
YES	Met by avail. untariffed NCm; contracts; or CPE..

For NCs Not Offered

1	Not technically feasible in near future.
2	Policy, pricing, or regulatory constraint.
3	Insufficient information or other unspecified reason.

SOURCE: AT&T Comments App. A, & Commission Staff Analysis

Table 2

NCs Provided in 6 Regions

NC#	NC Name	AMT	BA	BS	NYN	PAC	SWB	USW
3	CD/DA Interoffice	CNS	BSE	BSE	1	CNS	CNS	BSE
4	Multiple CF to DID	CNS	BSE	BSE	1	E/C	CNS	BSE
5	CF w/Status	BSE	BSE	TRF	BSE	BSE	1	BSE
9	CF w/Called/Calling	BSE	BSE	TRF	BSE	BSE	1	BSE
45	Customer Service Area	BSA	BSE	BSE	BSE	BSA	1	TRF
63	ESP Defined Dynamic Rte.	BSE	BSE	YES	BSE	1	BSE	BSE
74	Detect Breaks - 60 sec.	E/C	BSE	TRF	BSA	1	ANC	BSE
96	Virtual D Tone	BSA	YES	TRF	1	BSA	CNS	TRF
101	Carrier Sel. Rev. Chrg.	TRF	YES	BSE	BSE	BSA	1	TRF
27	Indiv. Access to H.G. Port	BSE	BSE	TRF	BSE	BSE	2	BSE
49	Preselect Data SVC	CNS	1	BSE	BSE	BSE	BSA	BSE
116	Direct Call Packet	CNS	BSE	BSE	BSE	BSE	1	BSE

Table 3

NCs Provided in 5 Regions

NC#	NC Name	AMT	BA	BS	NYN	PAC	SWB	USW
38	Postdial from Pay	YES	YES	2	YES	2	CNS	YES
56	Term Sets Analog	TRF	3	TRF	1	BSA	BSA	TRF
73	EDC	BSA	YES	1	1	BSA	BSA	YES
87	Inband Si G (see 56)	TRF	3	TRF	1	BSA	BSA	TRF
107	Bill # Del	BSE	1	BSE	BSE	BSE	BSE	1

Table 4

NCs Provided in 4 Regions

NC#	NC Name	AMT	BA	BS	NYN	PAC	SWB	USW
11	Cust Control CF/BY/DA	CNS	BSE	BSE	BSE	1	1	1
15	3-Way Call Transfer	BSE	1	BSE	1	BSE	1	BSE
40	Single # Mult Loc	1	BSE	TRF	BSA	1	1	TRF
23	Deliv Dialed #	BSE	BSE	1	1	1	A/E	BSE
111	Warm Line	CNS	1	BSE	2	BSE	1	BSE

Table 5

NCs Provided in 3 Regions

NC#	NC Name	AMT	BA	BS	NYN	PAC	SWB	USW
20	Derived Local Chan	1	1	BSE	BSA	1	1	TRF
41	Notify/Interrupt Cust	E/C	BSE	TRF	1	1	1	1
60	Accept w/BOC/ESP DNIC	BSA	TRF	3	1	BSA	1	1
61	Equal Access LEC Network	2	YES	2	YES	2	YES	2
82	Distinctive Ring	1	BSE	BSE	1	E/C	1	1
83	4-Wire SW	1	TRF	1	ALT	3	BSA	1
90	Disable Call Wait	1	BSE	1	BSE	1	1	BSE
100	Remote Speed Call	1	1	1	BSE	BSE	BSA	1
7	CF/Call Scrn	1	BSE	BSE	1	CNS	1	1
21	Screening	1	BSE	BSE	1	E/C	1	1

Table 6

NCs Provided in 2 Regions

NC#	NC Name	AMT	BA	BS	NYN	PAC	SWB	USW
2	Activate CF Var (T)	CNS	1	BSE	1	1	1	1
58	Compatib Exist CPE	2	YES	2	YES	2	2	2
68	Derive Chan. UL (AL)	1	2	2	BSA	1	1	TRF
69	One Way Alarm Trans.	2	2	1	BSA	2	BSA	2
81	Clear Access Der. Data	2	1	BSA	BSA	1	1	1
99	Packet Speed Call Change	1	1	1	1	CNS	CNS	1
104	CO Announcement	BSE	2	2	1	BSA	2	3
46	Stat Mux at CO	2	1	1	1	2	BSE	YES

Table 7

NCs Provided in 1 Region

NC#	NC Name	AMT	BA	BS	NYN	PAC	SWB	USW
17	Remote Activ. Cust. Call	1	BSE	1	1	1	1	1
28	Class Beyond CO	1	BSE	1	1	1	1	1
32	Access Extend Superframe	2	1	1	1	1	BSA	1
35	Line Side Answer Super	1	1	1	1	BSE	1	1
39	Select # Rev. Billing	1	BSE	1	1	1	1	1
42	Return Held Call	1	1	1	1	1	BSE	1
43	Special CPE	1	YES	2	1	2	1	2
80	Mux Alarms	1	1	2	BSA	1	1	1
84	Access Clear Chann	2	1	BSA	1	1	1	1
118	Restrict Outgoing Call	1	1	1	1	BSE	1	1

Table 8

NCs Not Provided

NC#	NC Name	AMT	BA	BS	NYN	PAC	SWB	USW
8	CFW/Call Wait	1	1	1	1	1	1	1
12	Monitor Barge	1	1	1	1	1	1	1
14	SMDI Auto	1	1	1	1	1	1	1
18	ESP Notif. Control Act	1	1	1	1	1	1	1
29	Suppressed ring	1	1	1	1	1	1	1
31	Trunk Side w/pwr ring	1	1	1	1	1	1	1
44	Share ESP Client	1	1	1	1	1	1	1
50	B-Channel SW/Ded. Access	1	1	1	1	1	1	1
51	D-Channel on B Chan	1	1	3	1	1	1	1
52	Multiple D on B	1	1	3	1	1	1	1
53	Access to D Chann Sig	1	1	3	1	1	1	1
54	FNSI N	1	1	2	1	1	1	1
55	SCP Data Base	1	1	1	1	1	1	1
57	Future ISDN Fns.	1	1	2	1	1	1	3
59	Map ANI to User ID	1	1	1	1	1	1	1
62	Peak Traffic Handling	1	1	1	1	1	1	1
64	CCS Access	1	1	1	1	1	1	1
65	Dynam Alloc.	1	1	1	1	1	1	2
66	Network Status	1	1	1	1	1	1	1
70	Derived Chann. for ISDN	1	2	1	1	1	1	2
85	User Diagnostics	1	1	3	1	3	1	1
86	Pass BOC Diag to User	1	1	1	1	1	1	1
91	Enable/Disable DTMF	1	1	1	1	3	1	1
92	Passive Inband DTMF	1	1	1	1	3	1	1
93	Extend DTMF Tone Set	1	2	1	1	1	1	2
94	Tone to Digital Translate	1	1	1	1	2	1	1
97	User Prog. Pack Fns.	1	1	1	1	1	1	1
98	Remote Menu Builder Packet	1	1	1	1	1	1	1
102	Net. Control By Customer	1	3	1	1	1	1	1
103	Real Time Traffic Data	1	1	1	1	1	1	2
105	Cust. Name Address	2	1	2	1	2	1	2
106	Supp. Call Fwd Click	1	1	1	1	1	1	1
108	Privacy	1	1	1	1	1	1	2
109	Traveling Class Mark	1	1	1	1	1	1	2
110	User ID rather than Bill #	1	1	1	1	1	1	1
117	Programmed CF	1	1	1	1	1	1	1
67	Real Time Testing	1	1	2	1	1	1	1

APPENDIX F

ADDITIONAL INITIAL ONA SERVICE DEPLOYMENT INFORMATION REQUIRED FROM EACH BOC

1. Ameritech may retain its existing reporting format, provided that it extends its projections through June 1992, and provided further that it defines the boundaries of the market areas that it identifies by name. When it says Cleveland, for example, Ameritech should state whether it is referring to the municipality of Cleveland, the Cleveland SMSA, the Cleveland LATA, or some other such designation that is commonly understood by market researchers. Alternatively, if Ameritech performs its business analyses on the basis of market areas whose boundaries are not commonly understand by persons unaffiliated with Ameritech, it should provide maps showing the boundaries of those areas.[1]

2. Bell Atlantic must extend its market-area projections through June 1992, and it should aggregate that same data to provide system-wide statistics for the same period.[2] Bell Atlantic must also define the market areas mentioned in its plan.

3. NYNEX must project the percentages of its access lines with initial ONA service availabilities through June 1992, on a market-area and system-wide basis, and define its market areas.

4. To clarify its claim that the "great majority" of its initial set of ONA services will be available in 12 metropolitan areas, SWBT must specifically identify which of those ONA services will be available by percentages of access lines on a market area and system-wide basis, though June 1992. SWBT must also define its market areas.

5. Pactel must aggregate the information that it has already provided at the wire center level to system-wide and market-area projections, showing availability percentages for individual ONA services for its entire system and for clearly defined market areas, through June 1992.

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1 Ameritech might comply with this requirement by adopting a market area definition that can easily be translated into geographic units that are recognized by the U.S. Bureau of the Census.

2 To the extent that Bell Atlantic's plans have changed, it should feel free to amend its projections.

6. US West must clarify its plan in several ways. US West can provide the aggregated system and market-area projections that we require, by stating, for each of its individual ONA services, the percentages of access lines on which they will be available, on a year-by-year basis, through June 1992. If these percentages will "approach" 100 percent, as US West alleges, it must provide numbers that show how closely the percentages will approach 100 percent. US West must name the market areas in which it will be providing these services, and provide descriptions of those places that ESPs can readily translate into geographic terms that are commonly understood by market researchers unaffiliated with US West.[3]

7. What BellSouth has done for four metropolitan areas, it must now do for all of the market areas in its territory, i.e., show the percentages of access lines on which each of its ONA services will be available for three years into the future. In addition, BellSouth must provide statistics for its overall system, and clearly define the geography encompassed by each of the market areas that it names in its amendment.

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3 The kinds of descriptions that US West has thus far provided for market areas are not readily translatable into U.S. Census cartography. Persons outside of US West do not necessarily know what terrain or population is involved when US West refers to a given city's "free" calling area. Similarly, when US West lists the switching offices that it associates with a given market area, an outsider would probably have difficulty translating this information into any commonly recognized cartography.

November 17, 1988

OPEN NETWORK ARCHITECTURE

Statement of Commissioner James H. Quello

Today, the Commission is approving,in substantial part, the ONA plans of the Bell Operating Companies. This represents a significant milestone in the move toward opening the network to true information age uses provided by a variety of vendors.

Today's action represents the culmination of a very significant effort on the part of the BOCs, the enhanced service providers and the FCC to find concensus on how to implement this important concept. It marks only the beginning, however, of implementation of ONA. As we have stated many times, ONA implementation is an evolutionary process and we expect that it will advance far from this rather modest beginning as new technology comes on line.

I am particularly concerned that we resolve the access charge issue with respect to the use of ONA by enhanced service providers. We have long recognized the need to keep costs to enhanced service providers as low as possible because they are on the leading edge of the information age in telecommunications. We want to continue to encourage new technologies at a price that will attract a wide variety of end users. A part of today's effort will establish a notice of proposed rulemaking to consider providing subsidy-free access to enhanced service providers. My initial view is that to do so would merely represent a continuation of our policy to treat ESPs as end users to network services instead of carriers. I will, of course, be interested in the comments in response to the upcoming rulemaking proposal.

I want to congratulate all of the interested parties to this proceeding for beginning a process which promises to provide this nation with a structure for advancing the future of telecommunications.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-583

In the Matter of

Amendment of Section 73.202(b), RM-6429
Table of Allotments,
FM Broadcast Stations.
(Meeker, Colorado)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 30, 1988; Released: January 3, 1989

By the Deputy Chief, Policy and Rules Division:

1. A petition for rule making has been filed on behalf of James H. Hicks (petitioner) requesting the allotment of FM Channel 257A to Meeker, Colorado, as that community's first local FM broadcast service. It is represented that petitioner will apply for the channel, if allotted.

2. The requested allotment of Channel 257A at Meeker conflicts with the allotment of Channel 256C2 at Glenwood Springs, Colorado.[1] Therefore, we have sought an alternate channel for Meeker. In this regard, we have determined that Channel 233A can be allotted to Meeker consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[2] Thus, we will propose the allotment of Channel 233A to Meeker. Although petitioner has indicated its intent to apply for an authorization on Channel 257A, he is requested to specify in his comments that he will now apply for Channel 233A if it is ultimately allotted.

3. In view of the fact that Meeker could receive a first local FM broadcast service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Meeker, Colorado	--	233A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 21, 1989**, and reply comments on or before **March 8, 1989**, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Roger J. Metzler, Esq.
Farrand, Cooper, Metzler & Bruiniers
P.O. Box 7329
San Francisco, CA 94120

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Channel 255C2 was initially substituted for Channel 224A at Glenwood Springs and the license for Station KMTS-FM modified accordingly. However, based upon a reconsideration request filed by Whale Communications of Colorado, Inc. (Whale), licensee of Station KKMG(FM), Channel 255C1, Pueblo, Colorado, Channel 256C2 was allotted to Glenwood Springs in lieu of Channel 255C2, to avoid a conflict with Whale's proposed transmitter location on an antenna farm. *See Memorandum Opinion and Order,* MM Docket No. 87-174, adopted August 19, 1988.

[2] This determination is based on the use of city reference coordinates for Meeker at 40-02-24 and 107-55-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-582

In the Matter of

Amendment of Section 73.202(b), RM-6443
Table of Allotments,
FM Broadcast Stations.
(Morehead, Kentucky)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 30, 1988; Released: January 3, 1989

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers the petition for rule making filed by Brad-Lee-Todd Corporation (petitioner) requesting the allotment of Channel 242A to Morehead, Kentucky, as that community's second local FM service. Petitioner states that he will apply for the new channel, if allotted.

2. A staff engineering analysis indicates that Channel 242A can be allotted to Morehead, Kentucky in compliance with the Commission's minimum distance separation requirements with a site restriction 3.2 kilometers (2.0 miles) northeast.[1] This restriction is necessary to avoid a short-spacing to applicants for Channel 242A, Wilmore, Kentucky.

3. In view of the fact that Morehead, Kentucky could receive its second local FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Morehead, Kentucky	221A	221A, 242A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 21, 1989**, and reply comments on or before **March 8, 1989**, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

James G. Hedrick, President
Brad-Lee-Todd Corporation
1057 Cresent Drive
Wheelersburg, OH 45694
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are 38-11-37 and 83-24-16.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-326

In the Matter of

Amendment of Section 73.202(b), RM-5778
Table of Allotments,
FM Broadcast Stations.
(Ephrata, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 30, 1988; Released: January 3, 1989

By the Deputy Chief, Policy and Rules Branch:

1. At the request of Read Broadcasting (petitioner), licensee of Station KGDN(FM), Channel 240A, Ephrata, Washington, the Commission considers herein the *Notice of Proposed Rule Making*, 2 FCC Rcd 5200 (1987), proposing the substitution of Chanel 222C2 for Channel 240A and modification of its license to specify operation on the new channel. The proposal could provide the community with its first wide coverage area FM station. The petitioner filed supporting comments restating its intention to construct the improved facilities. Randy Boruff (Boruff), filed additional supporting comments in which he expressed an interest in the new allotment at Ephrata.[1] Petitioner and Professional Broadcasting, Incorporated (PBI), licensee of Station KMPS-FM, Seattle, Washington, submitted reply comments. In addition, Boruff and PBI submitted late-filed reply comments.[2]

2. Petitioner suggested that Channel 230C2 be allotted to Ephrata as an additional equivalent class channel to accomodate competing expressions of interest for Channel 222C2. Petitioner demonstrated that the additional channel could be allotted to Ephrata in compliance with the Commission's technical requirements.

3. In reply comments, PBI urges the Commission to impose a site restriction on Channel 230C2 at Ephrata in order to protect its pending application to relocate the transmitter site for Station KMPS-FM to an informal "antenna farm". PBI states that the proposed site specified in its pending application will reduce shadowing problems and enable it to better serve Seattle.

4. As the Commission has held previously, an applied for, but unathorized transmitter site generally reflects a preference for a particular location and thus is not favored over the provision of a new service. *See Andalusia, Alabama*, 49 FR 32201, August 13, 1984, and cases cited therein. However, in regards to PBI's request for protection of its site specified in its pending application for Station KMPS-FM at Seattle, we have determined that it is possible to accommodate the application and allot Channel 230C2 to Ephrata. Our engineering analysis has confirmed that Channel 230C2 can be allotted to Ephrata in compliance with the Commission's minimum separation requirements with a site restriction of 10.9 kilometers (6.8 miles) south of the community. [3] The restriction would provide protection to the application for Station KMPS-FM at Seattle to relocate its transmitter site (BPH871030IE).

5. Channel 222C2 can be substituted for Channel 240A at Ephrata in compliance with the Commission's minimum distance separation requirements.[4] Petitioner expressed its desire to utilize its current transmitter site to implement the upgrade.[5]

6. Since Ephrata is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained.

7. In view of the aforementioned, we believe the public interest would be served by the substitution of Channel 222C2 for Channel 240A at Ephrata, Washington, as that community's first wide coverage area FM service. In addition, based on the expression of interest filed by Boruff, we believe it is also in the public interest to allot a second local FM service to Ephrata, Channel 230C2, as an additional equivalent class channel for application. We are herein modifying the license of Station KGDN(FM) to specify operation on Channel 222C2 in lieu of Channel 240A, since Channel 230C2 is available as an additional equivalent channel for applications. *See Modification of FM and TV Stations Licenses*, 98 FCC 2d 916 (1984).

8. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 13, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Ephrata, Washington	222C2, 230C2

9. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KGDN(FM), Ephrata, Washington IS MODIFIED, to specify operation on Channel 222C2 in lieu of Channel 240A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

10. The window period for filing applications for Channel 230C2 will open on **February 14, 1989,** and close on **March 16, 1989.**

11. IT IS ORDERED, That the Secretary of the Commission SHALL SEND BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Order* to Bellevue Radio, Inc., 10245 Main Street, Bellevue, Washington 98004.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. Questions related to the application process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-6908.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Boruff is co-owner of AM Station KULE in Ephrata, Washington.

[2] Boruff submitted late-filed reply comments, and PBI submitted further comments. The late-filed pleadings have not been accepted for consideration herein, in accordance with Section 1.415(d) of the Commission's Rules.

[3] The restricted site coordinates are 47-13-16 and 119-31-12.

[4] The reference coordinates are 47-19-00 and 119-33-00.

[5] The coordinates for the current transmitter site of Station KGDN(FM) are 47-19-14 and 119-34-21. We note that the allotment of Channel 222C2 to Ephrata at the petitioner's current transmitter site will preclude the application for Station KLSY-FM, Channel 223C, Bellevue, Washington, to relocate its transmitter site (BPH870909IB). Moreover, if petitioner were willing to relocate its transmitter site 4.8 kilometers (3 miles) northeast of Ephrata at coordinates 47-20-20 and 119-29-43, the Bellevue application would be acceptable. A copy of this *Order* will be served on Station KLSY-FM.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-168

In the Matter of

Amendment of Section 73.202(b),	RM-6217
Table of Allotments,	
FM Broadcast Stations.	
(Pine Bluffs, Wyoming)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 30, 1988; Released: January 3, 1989

By the Deputy Chief, Policy and Rules Division:

1. At the request of Robert Jason (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 2428 (1988), proposing the allotment of Channel 287C2 to Pine Bluffs, Wyoming, as that community's first local FM service. In response to the *Notice* petitioner filed supporting comments reaffirming his intention to apply for the channel. The allotment can be made in compliance with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[1]

2. We believe the public interest would be served by the allotment of Channel 287C2 to Pine Bluffs, Wyoming, as a first local FM service. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 13, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Pine Bluffs, Wyoming	287C2

3. The window period for filing applications will open on **February 14, 1989,** and close on **March 16, 1989.**

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The reference coordinates are 41-10-42 and 104-03-48. The site restriction of 7.8 kilometers (4.9 miles) northwest of the city originally required in the *Notice* to protect a construction permit for Station KMXX(FM), Channel 288A at Sterling, Colorado, is no longer necessary.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-169

In the Matter of

Amendment of Section 73.202(b), RM-6216
Table of Allotments,
FM Broadcast Stations.
(Burns, Wyoming)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 30, 1988; Released: January 3, 1989

By the Deputy Chief, Policy and Rules Division:

1. At the request of Gary Albarez (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 2430 (1988), proposing the allotment of Channel 270C2 to Burns, Wyoming, as that community's first local FM service. Petitioner filed supporting comments restating his interest in applying for the channel.

2. Channel 270C2 can be allotted to Burns in compliance with the minimum separation reqirements of Section 73.207(b) of the Commission's Rules, with a site restriction. A site restriction of 12.5 kilometers (7.8 miles) southwest of the community is necessary in order to avoid short spacings to Station KPNY(FM), Channel 271C2 at Alliance, Nebraska, and a construction permit for Station KELL(FM), Channel 267C at Bridgeport, Nebraska.[1]

3. We believe the public interest would be served by the allotment of Channel 270C2 to Burns, Wyoming, as a first FM service. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 13, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Burns, Wyoming	270C2

4. The window period for filing applications will open on **February 14, 1989,** and close on **March 16, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The restricted site coordinates are 41-07-05 and 104-28-08.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 3, 1989

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON REQUEST OF CHESTER TELEPHONE COMPANY FOR TEMPORARY WAIVER OF THE COMMISSION'S EQUAL ACCESS IMPLEMENTATION PLAN FOR INDEPENDENT TELEPHONE COMPANIES

On December 13, 1988, The Chester Telephone Company (Chester) filed a petition for a temporary waiver of the Commission's Equal Access Implementation Plan for independent telephone companies. According to Chester, on June 11, 1986, it received a request for an equal access conversion from one of its interexchange carriers. Pursuant to a Commission *Report and Order* (100 FCC 2nd 860 (1985)), Chester is required to complete the conversion within three years of the request date, which, in this case, would be June 11, 1989. Chester states that an additional seven months is necessary in order to complete the conversion due to unforeseen developments. Chester contends that the installation of the equipment was completed in April, 1988. However, Chester was recently notified by its switch programming supplier that additional software would be necessary in order to properly provide equal access service. Chester argues that the additional time is necessary to allow for the delivery of the new software, installation and testing. Chester believes that equal access conversion will be completed and implemented by January 31, 1990. Chester also notes that the interexchange carrier that requested the conversion has been fully apprised of this situation and it has agreed to the new date of completion.

Interested parties should file comments on this petition by **January 29, 1989,** and reply comments by **February 12, 1989,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of Chester's petition can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 87-213

In the Matter of

Trunking in the Private Land Mobile Radio Services for More Effective and Efficient Use of the Spectrum — RM-5398

NOTICE OF PROPOSED RULE MAKING

Adopted: December 12, 1988; Released: January 3, 1989

By the Commission: Commissioner Quello dissenting in part and issuing a separate statement.

I. INTRODUCTION

1. This Commission has before it a *Notice of Inquiry* (*Inquiry*) [1] that discusses the available options for further fostering the use of trunked radio systems in the private land mobile radio services.[2] By this *Notice of Proposed Rule Making* (*Notice*), we are proposing certain rule changes that will increase the number of frequencies available for trunked technology. Although the *Inquiry* discussed the use of trunking in all private land mobile radio bands, we are limiting the discussion in this *Notice* to frequencies above 800 MHz. We will consider the issues involved in allowing trunking on frequencies below 800 MHz in subsequent phases of this proceeding.

II. BACKGROUND

2. There are two types of systems licensed in the private land mobile services. The first and most common type is the conventional land mobile system. The distinguishing feature of conventional systems, which are authorized in all private land mobile frequency bands, is that the user selects a channel manually. Most conventional systems are authorized one channel, or channel pair, but can be authorized more. The other type of system in use today is the trunked system. Such systems usually employ five or more channel pairs. A computer automatically routes the user to the first available channel or places the user in a waiting line (queue) to be served in turn. Trunked operation is currently permitted on all 800 MHz base/mobile channels except those specifically designated for conventional use.[3] Further, trunked assignments are made on an exclusive basis at the time of grant regardless of the initial loading. Conventional operations, on the other hand, must achieve a certain level of loading before they receive exclusive use of a channel.[4]

3. Trunking technology was first introduced in the private land mobile radio services in 1974 concurrent with the allocation of 600 channel pairs in the 800 MHz band.[5] In that action, we designated 100 of these 600 channel pairs for conventional use only and 200 channel pairs for trunked operation. The remaining 300 channel pairs were kept in reserve. It was not long, however, before there were shortages of conventional channels. As a result of these shortages, we released an additional 50 of the 300 reserve channels for conventional use bringing the total number of conventional channels to 150.[6] On the other hand, trunked operations were slower to develop because of the lack of available equipment and relative high cost. As trunked equipment proliferated, its superior efficiency became apparent, causing a rapid increase in the number of radio systems using this technology. Growth was so rapid, in fact, that by late 1979 waiting lists for trunked frequencies were started in the major metropolitan areas.[7] The greatest demand for trunked frequencies came from specialized mobile radio (SMR) operators.[8]

4. In response to the demand for additional frequencies for trunked systems use, we released the remaining 250 private land mobile channel pairs in 1982.[9] Unlike the 1974 allocation, the new channels were not divided according to system technology but instead were grouped according to broad service categories.[10] Applicants in each of these categories were allowed the flexibility to use either trunked or conventional systems. Although the SMR category was provided eighty of the 250 channel pairs, this allotment was still insufficient to meet the growing demand for SMR systems in many of the large urban areas.

5. In the past, we have taken numerous steps to help meet the demand for 800 MHz systems and to ensure that this spectrum is being used efficiently. For example, we instituted a channel recovery program to recover underutilized 800 MHz frequencies.[11] These recovered channels are then made available to other users for system expansion or for new systems. We have adopted rules allowing intercategory sharing[12] on a limited basis and have allowed the partial assignment of trunked SMR authorizations.[13] We have also allocated additional spectrum from the 900 MHz reserve to the private land mobile services.[14] While this spectrum can be used to establish new trunked systems, it cannot be used to expand existing 800 MHz trunked systems because of incompatibility of current equipment. While all of these steps have provided some relief, the general scarcity of spectrum available for trunked operation is still a problem in many parts of the country, particularly for SMRs.

6. We believe it is in the public interest to make more efficient use of existing private land mobile spectrum. We can accomplish this by expanding the use of both trunking and intercategory sharing. To this end, our *Notice of Inquiry* in this proceeding was adopted to explore the problems involved in expanding the use of trunking.

III. COMMENTS

7. Fifteen parties submitted comments in response to the *Inquiry* and five parties filed reply comments.[15] Generally, all commenters support the Commission's goal of increasing the efficient use of private land mobile spectrum through the use of trunking. A number of parties, however, state that trunking should remain optional and that there is a genuine need to preserve the ability to operate in the conventional mode. The Association of American Railroads (AAR), for example, states that "while trunking may be useful in certain congested areas, implementation of trunking in more remote regions

(where most railroad operations are situated) simply would not be feasible."[16] The American Petroleum Institute (API) notes that "for many PLMRS eligibles, including API members, it is not economically viable nor technically feasible to employ trunked systems."[17] Those entities with needs for conventional systems urge the Commission to take into consideration the communication requirements of all radio users in determining whether and to what extent the use of trunking should be expanded. In this vein, API and the Utilities Telecommunications Council (UTC) recommend that we continue to reserve some 800 MHz channels for conventional use only.[18] The Association of Maximum Service Telecasters (MST), on the other hand, argues that we should create incentives for, or mandate, the use of trunked technology.[19]

8. Forest Industries Telecommunications (FIT), Mobile U.H.F., and Associated Public-Safety Communications Officers, Inc. (APCO) state that trunking should be permitted in all portions of the private land mobile spectrum.[20] Most commenters, however, support expanding trunking above 800 MHz, while expressing concerns about allowing trunking below 800 MHz. Generally, these commenters do not argue against allowing trunking on frequencies below 800 MHz, but rather, emphasize that there are a number of additional problems associated with its implementation in these lower bands. For example, the comments of the Land Mobile Section of the Electronic Industries Association (EIA) state:[21]

> In sum, the ability of equipment manufacturers to provide trunked systems on a timely basis on spectrum below 800 MHz exists. There are, however, operational and administrative hinderances combined with the heavy present usage of the more attractive bands, that must be overcome before trunking to any meaningful degree can occur.

Because of the additional problems associated with trunking below 800 MHz, a number of commenters recommend that the Commission deal with this issue separately so as not to delay expanding trunking above 800 MHz.[22]

9. Only a few of the commenters address the specific questions set forth in the *Inquiry*.[23] In general, these commenters favor some expansion of trunking above 800 MHz, particularly on the original 150 conventional channel pairs for system expansion. Regarding existing trunked systems seeking to expand, most entities recommend that we (1) require applicants first to consider all in-category frequencies, (2) make conventional channels assigned to trunked systems subject to trunked construction and loading requirements, (3) limit system expansion to one channel more than the current system loading warrants, (4) maintain present frequency coordination requirements, and (5) recover out-of-category frequencies assigned as a result of interservice sharing first and return them to their original frequency pool.[24]

10. Concerning the questions on whether we should allow unused out-of-category frequencies to be used for the construction of new trunked systems, the American SMR Network Association, Inc. (ASNA) argues that we should not allow entities to establish new trunked systems on unused conventional channels. According to ASNA, such an action would reduce the number of channels available to existing trunked systems seeking to expand.[25] Further, ASNA argues that such an action could deny the legitimate needs of Business and Industrial/Land Transportation eligibles.[26] The National Association of Business and Educational Radio, Inc. (NABER) also filed comments against allowing entities to employ unused conventional frequencies to establish new trunked systems. NABER is concerned that applicants could bypass waiting list procedures for grant of SMR licenses.[27] The Special Industrial Radio Service Association (SIRSA), on the other hand, favors allowing entities to implement new trunked systems on the 150 conventional channels.[28]

11. In response to the issue of combining existing conventional systems in order to form one trunked system, NABER, ASNA, SIRSA, State of Connecticut, and API favor allowing conventional channel licensees who have exclusive use of their channels to combine and trunk over all associated channels.[29] ASNA would impose the condition that such conventional licensees co-locate their systems so that the trunking takes place from one site. It also suggests that the conventional systems combining channels be licensed as a single SMR system.[30] In cases that involve combining a number of multiple licensed systems *(i.e.,* community repeaters), NABER suggests that the Commission require the consent of all involved users before allowing the conventional channels to be used in a trunked mode.[31] SIRSA disagrees with ASNA's recommendation that conventional systems combining together should be licensed as SMRs. It argues that users should be allowed the flexibility to choose not to be licensed as SMRs.[32]

12. In the *Inquiry*, we asked whether rules governing trunking in the 800 MHz band should be extended to the 900 MHz band. ASNA states that it favors extending any new rules and policies adopted at 800 MHz to the 900 MHz band. It recommends that we allow trunked SMRs access to 900 MHz frequencies in the Business and Industrial/Land Transportation categories at the same time we allow intercategory sharing between these two categories.[33] SIRSA opposes this position. It urges the Commission to allow intercategory sharing at 900 MHz between the noncommercial categories before providing SMRs access to this spectrum.[34]

13. Finally, General Electric Mobile Communications Business (GE) recommends that the Commission establish a trunking standard so as to make interoperability among existing trunked systems mandatory. It argues that users are "effectively 'locked in' to one manufacturer by the choice of equipment." This, according to GE, limits user flexibility by denying entities the ability to switch to another trunking system in the same market that offers superior service at lower rates.[35] Motorola, Inc. (Motorola) disagrees with GE's analysis. It claims that the adoption of a trunking standard would limit, rather than expand, the public's choices of equipment. According to Motorola, GE's proposal would retard innovation.[36]

IV. DISCUSSION

14. We have reviewed the comments and believe it is timely to propose specific rule changes for expanding trunking opportunities on frequencies above 800 MHz. This is not the case, however, for allowing trunking below 800 MHz. The problem of allowing the use of trunked technology on frequencies that have no provisions for exclusivity is difficult and would take much time and

effort to resolve.[37] Rather than delay progress on expanding trunking opportunities above 800 MHz, we will separate this proceeding into stages, dealing first with trunking above 800 MHz. We will examine the feasibility of allowing trunking below 800 MHz at a later date.

15. The purpose of this *Notice* is to examine ways to increase the opportunities for trunked systems in the private radio frequency bands above 800 MHz.[38] One possible way to accomplish this would be to allow trunking on the 150 conventional frequencies at 800 MHz that are currently available only for conventional operation.[39] We could also expand our intercategory sharing rules. For example, under the current rules, trunked SMR licensees have access only to unused out-of-category frequencies.[40] We could allow these licensees access to out-of-category frequencies that are currently in use for system expansion. In this *Notice*, we are proposing a combination of these options together with appropriate conditions to ensure that sufficient opportunities remain for users requiring conventional operations. These options are consistent with our overall policies regarding sharing and reducing government regulation as well as our goal of increasing efficient use of existing spectrum.

A. Trunking on the 150 conventional frequencies.

16. The 150 frequencies detailed in Section 90.615 of the Rules are available only for conventional use; trunked operation is not permitted.[41] Allowing these frequencies to be trunked is probably the single most significant step we could take to help satisfy the demands of the SMR industry for additional spectrum for trunking. There are several urban areas where fully loaded trunked SMR licensees seeking to expand can no longer obtain frequencies from the Commission, either from their own pool of frequencies or through intercategory sharing, while some of the 150 conventional frequencies are still available. Allowing trunking on these frequencies would increase spectrum efficiency both by using idle frequencies and by providing for a generally more efficient technology. On the other hand, allowing trunking on these frequencies would reduce the number of frequencies available for conventional operations. In this regard, several parties filing comments indicate that they have a need only for conventional operations.

17. Our analysis of the comments to the *Inquiry* leads us to conclude that the public interest will be best served by allowing trunking on the original 150 conventional frequencies. Trunking is a more spectrum efficient mode of operation. Further, we propose trunking as an option and not a requirement. Consequently, entities would still be able to use any of these frequencies in the conventional mode. We believe that the public interest is best served by providing our licensees the flexibility to use frequencies in the manner that best suits their needs. We see no reason to continue to reserve these frequencies for conventional use only, especially when many areas of the country have a greater demand for trunked operation than for conventional operation. By making these frequencies available for both types of operations we will let demand determine use.

18. We could implement trunking on these frequencies in several ways. We could divide the original 150 conventional frequencies among the various service categories or place all the frequencies in one of the four service categories as we did with the original 200 trunked frequencies.[42] We could also treat these 150 frequencies as a separate "general access" category. We believe this latter approach is best. Under the current rules, the 150 conventional frequencies are assigned on a "first come, first served" basis to any Part 90 eligible. Consequently, the same frequency may be assigned to a public safety entity in one area, a business entity in another and a power company in still another area. Further, there is currently a variety of users on these frequencies, unlike the original 200 trunked frequencies which are predominantly used by SMRs. These facts make the options of dividing the 150 channels into each of the four service categories or assigning all of the frequencies in one of the existing service categories difficult from an administrative standpoint. The present assignment policy, however, does not present a problem if we treat these frequencies as a separate "general access" category. Establishing a general access category also is consistent with how we license "unassigned" frequencies in the 470-512 MHz band.[43] Therefore, we propose to treat these frequencies as a separate distinct category and designate it the "General" Category.

(1) Expanding existing trunked systems on unused General Category frequencies.

19. We currently have rules governing the use of unused (unlicensed) frequencies in one service category by eligibles in another service category for system expansion.[44] In developing these intercategory sharing rules, we established criteria for determining under what conditions out-of-category entities can invoke intercategory sharing.[45] These criteria are necessary to protect the needs of in-category users. The same concerns apply to the General Category where the in-category users are those who need conventional systems only. To protect the interests of these in-category users, we are proposing minimal restrictions to licensees of trunked systems seeking frequencies from the General Category for system expansion. These restrictions are similar to the intercategory sharing provisions that currently apply to the other service categories.

20. We propose to allow licensees of existing trunked systems loaded to 70 mobiles per channel access to unused frequencies in the General Category. We propose to limit this access to one more frequency pair than the expanding system's current loading warrants. Finally, we propose that all applications for unused General Category frequencies to expand fully loaded existing trunked systems include a statement from the applicant's own category coordinator that frequencies are not available in its service category (*i.e.*, one of the four service pools).[46] Because there is no private group coordinating frequencies in the SMR Category, we propose that an SMR licensee submit a statement that no 800 MHz frequencies are available in the SMR category in the proposed area of operation. The existence of a waiting list for SMR pool frequencies will verify this statement. We also propose to "take-back" these conventional channels first from any trunked system that is subsequently subjected to a channel recovery action due to insufficient loading. Further, if a licensee obtaining conventional frequencies through this process has an application on a waiting list, the application will be removed from the list unless the system remains fully loaded even after acquiring the new frequencies, in which case the application will retain its original position.[47]

21. The Rules require that applications for intercategory sharing of frequencies be accompanied by frequency coordination.[48] Because frequency coordination serves to

maintain an accurate data base, we do not intend to change this requirement for applications by trunked users for General Category frequencies. Under our proposal, however, SMRs now will be allowed access to unused General Category channels to expand trunked systems. These channels are currently coordinated by three groups.[49] Thus, we must decide the appropriate coordination procedure to be employed.

22. The primary objective of this *Notice* is to make more efficient use of the existing private land mobile 800 MHz band allocation and to do so as quickly as possible to provide relief to 800 MHz users. To maintain an accurate data base reflecting the use of General Category frequencies, we must establish some mechanism for coordinating trunked SMR systems operating on these frequencies.[50] Accordingly, we propose to allow trunked SMRs requesting General Category frequencies to obtain coordination from any of the three certified coordinators in this band.[51] Furthermore, we propose to modify the frequency coordination procedures for conventional SMRs operating on the General Category channels. Inasmuch as we are proposing to allow trunked SMRs seeking these channels to utilize the services of any of the three recognized coordinators of those frequencies, it would be consistent to allow applicants for conventional SMRs this same flexibility. This would establish common procedures for both trunked and conventional SMRs on these channels.

(2) Expanding existing trunked systems on in - use General Category frequencies.

23. We also propose to allow licensees of existing trunked systems loaded to 70 mobiles per channel access to in-use General Category frequencies. Under this proposal, an existing licensee operating on one (or more) of the 150 General Category channels may assign its authorization to an eligible trunked licensee with a fully-loaded system, subject to the filing of an assignment application and our approval of the application. A licensee seeking to expand an existing trunked system will receive the assignor's license expiration date.[52] In essence, the new licensee would stand in place of the original licensee.

24. Consistent with our approach that allows fully-loaded trunked systems seeking to expand to employ unused General Category frequencies, we propose to establish certain criteria for determining when trunked systems seeking to expand can take advantage of in-use General Category frequencies. In this regard, we propose to apply the same criteria as we did above for expanding systems seeking access to unused General Category frequencies.[53] In addition, we propose to require that the new frequencies be used at the primary site of the expanding system. Administratively, this simplifies the licensing process and it is consistent with our current policy of requiring all frequencies that are trunked in one system to be located at a primary site.[54] Certain commenters, in fact, suggested that this be required.[55]

25. Our proposal would not require the assignor of the conventional authorization to have exclusive use of the channel.[56] When the frequency is shared by more than one licensee, however, we propose that the application for assignment include a signed statement listing all affected co-channel licensees verifying that they all have agreed to the proposed assignment or shared use.[57] This requirement will prevent any licensee from significantly affecting the use of a shared frequency by other co-channel users.

26. We also propose to allow a licensee of one or more General Category channels to transfer for a profit its authorization(s) to an eligible out-of-category trunked licensee regardless of whether the transferor has completed construction of its authorized station(s). In other words, we would permit for-profit transfers from a licensee of an unconstructed conventional system to a trunked licensee to expand its trunked system. We would also permit such transactions when the transferee is in the process of accumulating channels for the purpose of creating a new trunked system. Given our goal of promoting the development of spectrally efficient trunked systems, we tentatively conclude that the public interest would be served by not inquiring into the amount of profit, if any, the transferor realizes on such a sale, and by not limiting such transfers to completed systems only.

27. We recently discussed allowing for-profit transfers of construction permits in the Domestic Public Cellular Radio Telecommunications Service.[58] We concluded that such transfers are permissible under the Act and serve our goal of promoting the rapid provision of cellular service by facilitating the creation of economically, viable, competitive cellular systems in many markets. Similarly, we see no reason to inquire into any profit that may be realized by the transferor of an unconstructed conventional license for use in a trunked system. Our overriding goal in this proceeding is to promote spectrum efficiency. Since facilitating the creation or expansion of trunked systems accomplishes that goal, we tentatively conclude that allowing these transactions for this purpose in this private land mobile service is warranted.

28. At the same time, however, we are concerned that licensees of General Category channels not speculate in such authorizations. Accordingly, we propose that the sale of a General Category authorization for unconstructed facilities will be permitted only after a showing by the transferor that it is not speculating in private land mobile radio licenses. This provision, which would be analogous to that contained in Section 22.40(b) of our Rules for the Public Land Mobile Service, would require a transferor to demonstrate that it acquired the General Category authorization for the purpose of constructing and operating the system, and that its decision to sell was prompted by changing business circumstances or marketplace conditions. This approach has proved effective in the Part 22 services and we tentatively conclude that it will be equally effective here. We invite comments on our proposal to allow the license transfers discussed above.

29. In reaching our tentative conclusion to allow the transfer of an unconstructed conventional frequency authorization, we are mindful that Congress did not intend the Commission to employ auctions or similar economic methods in managing the private land mobile spectrum. In discussing the 1982 amendments to Section 331(a) of the Act, Congress stated its concern that allocating frequency space based on a " . . . user's monetary ability to pay for a frequency allocation will work to the detriment of an efficient and competitive private land mobile spectrum."[59] Our proposal is intended to provide flexibility and incentives for private land mobile licensees to assemble spectrally efficient trunked systems to meet the demand for land mobile services. We request comment on whether such transfers would be inconsistent with the Congressional intent. In considering this question, commenters may wish to address whether allowing uncon-

structed license transfers is necessary in light of the other measures we propose here to help alleviate the shortage of channels available for trunked use.

30. Frequency coordination is also an issue relevant to trunked systems seeking to expand by employing in-use General Category frequencies. We propose that licensees of trunked systems applying for General Category frequencies that are currently being used submit a coordination statement from the coordinator in the service in which the assignor's system is licensed. This will allow the data base to be changed to reflect trunked use of the channels. If the General Category frequency or frequencies being assigned are already licensed to an SMR, then the assignee may submit a coordination statement from any of the three recognized coordinators of the conventional frequencies. Frequency coordination in these cases is necessary to maintain an accurate data base.

(3) Establishing new trunked systems on General Category frequencies.

31. The *Inquiry* solicited comments on whether we should allow new trunked systems to be established on the 150 conventional frequencies. We noted that this would be of particular interest to SMR operators that wish to establish a new SMR trunked system capable of interfacing with an existing trunked SMR operating in the 800 MHz band but for whom no SMR pool frequencies are available. The *Inquiry* also addressed allowing existing licensees operating on the conventional frequencies to combine their operations into a new trunked system.

32. The current rules do not provide for new trunked SMR systems to be established by acquiring frequencies through intercategory sharing. The purpose of this restriction is to accommodate the needs of in-category eligibles. The General Category, however, differs somewhat from the specific service categories. For example, any entity that can establish eligibility in one of the four service categories is eligible to be licensed on these frequencies. Consequently, unused conventional frequencies can be employed to establish new Public Safety, Business, SMR, and Industrial/Land Transportation conventional systems. We have already proposed to allow trunking of these frequencies. Consequently, we see no reason to differentiate between in-category eligibles establishing a new conventional system or a new trunked system. We propose, therefore, to allow entities to establish new trunked systems on General Category channels. We also propose to limit the number of channels that we will license at any one time for a new system to five. This is consistent with the current provisions of Section 90.621(a) of the Rules.

33. We recognize, however, that it is considered more efficient to accommodate the expansion of fully loaded trunked systems as opposed to creating new trunked systems. In fact, we note our decision when we merged Subpart M and S of Part 90 where we specifically granted preferences to fully-loaded systems over new systems.[60] We therefore propose to initially limit access to the General Category channels to existing trunked systems seeking to expand. After we have allowed such expansion of existing systems for six months, we will accept applications for new systems on the General Category frequencies. These restrictions will not apply to applicants for conventional operations or to applications that seek authority for one or more existing conventional licensees to combine operations into a new trunked system (*See* para. 35 *infra).* Systems seeking these channels for expansion will be required to submit a new application, even if they are on a waiting list for additional frequencies, and will be processed on a "first come - first served" basis.

34. We propose to follow the same frequency coordination procedures for establishing new systems that we propose herein for existing systems seeking conventional frequencies for system expansion. Under this approach, an applicant proposing to establish a new trunked SMR system, for example, could obtain frequency coordination from any of the three recognized coordinators of the conventional frequencies.

35. We also propose to allow existing conventional licensees of the General Category frequencies to combine channels and trunk over those channels. In essence, these entities could combine several existing conventional systems to form a new trunked system. Existing conventional users licensed on the original 150 conventional frequencies also could combine with existing conventional users licensed in one of the present four service categories to form a new trunked system.[61] We believe that the regulatory flexibility inherent in allowing such use will allow the creation of new, more spectrum efficient systems that could provide additional communications service. The frequencies being combined do not have to be licensed on an exclusive basis. If there is more than one licensee involved, however, the application must include a signed statement listing all affected co-channel licensees and verifying that they all have agreed to the proposal.

36. Administratively, such an action would be treated as a license modification. Frequency coordination, therefore, would be required.[62] Consistent with our policy for trunked operation in other categories, all frequencies being trunked together in the new system must be located at a primary site. Further, the new trunked system must be licensed to a single entity. At this time, we propose to allow all affected channels to be part of the new trunked system but we do solicit comments on whether the total loading of all the licensees should account for the number of channels permitted. For example, if eight licensees of eight different conventional systems having a cumulative loading figure of 280 mobiles agree to form a single trunked system, should this cooperative venture be limited to four or five channels.[63] We propose that the loading deadline will be calculated from the original date of each license being combined. If each license is more than five years old then the assignment date will be used for loading purposes.

B. Intercategory sharing between the other service categories

(1) Expanding existing trunked systems

37. Another way we could provide some relief to entities needing 800 MHz frequencies for trunked operation would be to expand our current intercategory sharing rules. We could, for example, allow existing trunked systems access to in-use frequencies in other service categories. Expanding trunked systems currently have access only to unused (unlicensed) frequencies through the intercategory sharing process. We have received requests from licensees to trunk over frequencies that are allocated in another service category and are currently licensed. Such requests are becoming more prevalent due to the shortage of 800 MHz frequencies. Allowing this option would increase spectrum efficiency and allow market forces to prevail.

38. We propose to allow licensees of existing trunked systems loaded to 70 mobiles per channel access to in-use frequencies in service categories in which the licensee is currently eligible under the intercategory sharing rules.[64] Such use will be subject to the conditions proposed herein for expanding trunked systems employing in-use frequencies in the General Category. Expanding our intercategory sharing rules to allow existing trunked systems access to frequencies that are in use provides another option for licensees to satisfy their communication needs. Further, this proposal is consistent with our desire to ensure efficient use of the spectrum with a minimum of government intrusion. Also, allowing such use should help expedite the movement of scarce 800 MHz frequencies to their highest valued use.

(2) Establishing new trunked systems

39. We could also allow out-of-category frequencies to be used to establish new trunked SMR systems.[65] For example, we could allow entities to employ unused out-of-category frequencies from the Business pool of frequencies to form a new trunked SMR system. The advantage to expanding intercategory sharing in this way is that it increases the options available to satisfy user communication requirements. The primary disadvantages, however, are that it could reduce the number of frequencies available for in-service users and the number of frequencies that could be used for expansion of 800 MHz trunked systems.

40. Although we are aware of the demand for frequencies to establish new 800 MHz trunked SMR systems, we are not proposing to permit the establishment of new systems on unused frequencies where the entity is not a primary eligible. In the Public Safety/Special Emergency, Business, and Industrial/Land Transportation Categories, primary eligibility is restricted. Allowing out-of-category entities to establish new trunked SMR systems on frequencies in these service categories might well deny the legitimate needs of category eligibles. Further, SMRs already have access to the non-public safety pools through the intercategory sharing process. This issue is therefore, quite different from allowing the use of trunking on the 150 conventional channels. Finally, precluding entities from employing unused out-of-category frequencies to establish new trunked SMR systems will leave unused frequencies, if any, available for trunked system expansion, which could make more efficient use of the spectrum.

41. We also are not proposing to expand intercategory sharing to allow SMRs to access frequencies in the Public Safety category.[66] The public safety community is currently in the process of preparing regional plans for the assignment of stations in its recently allocated 6 MHz of spectrum. The 70 channels in the public safety pool at 800 MHz is a vital consideration in this planning effort. Because we do not want to disrupt the regional planning process, we do not propose to allow SMRs access to the public safety pool of frequencies.

(3) Intercategory sharing in the 900 MHz band

42. The *Inquiry* also raised the question of whether to apply the 800 MHz intercategory sharing rules and policies to the 900 MHz band. Currently, there are provisions for intercategory sharing at 900 MHz involving only the Business and Industrial/Land Transportation categories.[67] There is no provision for SMRs operating at 900 MHz to access out-of-category frequencies. We have just started to license 900 MHz SMR systems. If the initial interest in 900 MHz SMRs is any indication, we anticipate that SMRs operating on 900 MHz frequencies in the major urban areas will soon have the same problems of obtaining frequencies as do 800 MHz SMRs. Expanding 900 MHz sharing opportunities makes more efficient use of that spectrum and makes the 900 MHz rules fully consistent with those governing operation at 800 MHz. Accordingly, we propose to allow SMRs to access 900 MHz frequencies in the Business and Industrial/Land Transportation categories beginning on the same date sharing between the latter two categories will be effective. Further, we propose to apply the same rules and policies being proposed herein for 800 MHz to intercategory sharing at 900 MHz.

C. General

43. GE recommends that we establish an equipment compatibility standard for private land mobile trunked equipment operating in the 800 MHz band.[68] Private land mobile conventional 800 MHz equipment has been available on the market since 1976. Trunked equipment was available approximately two years later. Consequently, there are tens of thousands of users operating radio equipment in the 800 MHz band. Equipment manufacturers have large investments in present equipment designs and inventories. Therefore, an equipment compatibility standard in this segment of the 800 MHz band at this stage could present a substantial cost burden to users, equipment manufacturers and dealers/suppliers, as well as disrupt the marketplace that has evolved. Therefore, we decline to propose an 800 MHz equipment compatibility standard.[69]

44. The proposed rules are presented in Appendix B. In addition to comments on the specific proposals put forth, any other comments relating to the subject of expanding trunking above 800 MHz are invited.

V. SUMMARY

45. In order to provide some additional relief to 800 MHz private land mobile users we propose the following:

(a) To allow under certain conditions fully loaded trunked systems access to the 150 conventional frequencies at 800 MHz for system expansion.

(b) To allow, after six months, new trunked systems on the 150 conventional channels.

(c) To allow, under certain conditions, existing users on the conventional channels to combine with other users on those frequencies or with conventional users in the service categories to form new trunked systems.

(d) To expand, under certain conditions, our intercategory sharing rules to allow entities to access out-of-category frequencies that are in use.

(e) To expand intercategory sharing provisions at 900 MHz to include the SMR Category.

VI. INITIAL REGULATORY FLEXIBILITY ANALYSIS

A. Reason for Action.

46. The Commission proposes to amend its rules to expand trunking on frequencies above 800 MHz. The proposals are intended to increase the efficient use of existing private land mobile spectrum. This action would allow trunked systems to access additional frequencies, thereby providing service to a greater number of people, expedite the movement of scarce 800 MHz channels to their highest valued use, and provide a more consistent set of rules governing operation on frequencies above 800 MHz.

B. Legal Basis.

47. The proposed action is authorized under Sections 4(i), 303(r), and 331(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 332(a).

C. Reporting, recordkeeping and other compliance requirements.

48. No new requirements will be imposed upon licensees in the private land mobile services.

D. Federal rules which overlap, duplicate, or conflict with this rule.

49. None.

E. Description, potential impact, and number of small entities affected.

50. The Commission expects the proposals to provide increased opportunities to current trunked licensees and potential licensees. Although we believe it is too early to estimate the total effect of these proposals, we anticipate that the overall effect on small entities would be favorable. The proposal would permit trunked systems to provide service to a larger number of end users. The proposed rules may, however, make it difficult for those entities who want to establish their own conventional communication systems to find sufficient frequencies. The Commission has proposed, however, certain rule changes that minimize this potential impact.

F. Any significant alternative minimizing the impact on small entities and consistent with the stated objectives.

51. All significant alternatives have been addressed in the *Notice*. Further, this item is intended to minimize the regulatory burdens to our licensees, many of whom may be considered small business entities.

VII. PAPERWORK REDUCTION ACT STATEMENT

52. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure or record retention requirements, and will not increase burden hours imposed on the public. Rather, if adopted as proposed, the licensing burden on the public could be reduced.

VIII. PROCEDURAL MATTERS

53. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. § 1.1203.

54. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. § 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion to the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. 47 C.F.R. § 1.1206.

55. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r). Interested persons may file comments on or before **March 10, 1989,** and reply comments on or before **April 7, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that the fact of the Commission's reliance on such information is noted in the report and order.

56. In accordance with the provisions of Section 1.419 of the Commission's Rules, 47 C.F.R. § 1.419, formal participants shall file an original and five copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters at 1919 M Street, N.W., Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Comments

American Petroleum Institute
American SMR Network Association, Inc.
Associated Public-Safety Communications Officers, Inc.
Association of American Railroads
Association of Maximum Service Telecasters
Electronic Industries Association, Land Mobile Section
Forest Industries Telecommunications
General Electric Mobile Communications Business
Hudson Valley Communications
Manufacturers Radio Frequency Advisory Committee, Inc.
Mobile U.H.F., Inc.
National Association of Business and Educational Radio, Inc.
Special Industrial Radio Service Association, Inc.
State of Connecticut
Utilities Telecommunications Council

Reply Comments

National Association of Business and Educational Radio, Inc.
Manufacturers Radio Frequency Advisory Committee, Inc.
Motorola, Inc.
Special Industrial Radio Service Association, Inc.
Utilities Telecommunications Council

APPENDIX B

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 90 is modified to read as follows:

Authority: Sections 4, 303, 331, 48 Stat., as amended, 1066, 1082; 47 U.S.C. §§ 154, 303, and 332 unless otherwise noted.

2. The Table of Contents to Part 90 is amended by revising the heading in Section 90.615 to read as "Frequencies available in the General Category".

3. Section 90.609 is amended by revising the title, by adding a new paragraph (b)(3), and by revising paragraph (c) to read as follows:

§ 90.609 Special limitations on amendment of applications for assignment or transfer of authorizations for radio systems above 800 MHz.

* * * * *

(b)(3) The authorization is for a conventional system assigned on a General Category frequency and the assignee, or transferee, is either an existing trunked licensee or an applicant proposing to use the frequency as part of a new trunked facility. The application must be accompanied with a demonstration that the assignor or transferor has not acquired the authorization for the principal purpose of profitable sale rather than constructing and operating a radio system and that its decision to assign the authorization was prompted by changing business circumstances.

(c) Licensees of constructed systems are permitted to make assignments, including partial assignments, of an authorized grant to an applicant proposing to create a new system or to an existing licensee that has loaded its system to 70 mobiles per channel and is expanding that system. Frequencies need not be available on an exclusive basis to be assigned. In cases where other licensees may be affected the applicant must submit a signed statement listing all affected co-channel licensees (including call signs) and verifying that they all have agreed to the proposed assignment. An applicant authorized to expand an existing system or to create a new system with frequencies it obtains through assignment will receive the assignor's existing license expiration date and loading deadline. A licensee that makes an assignment, full or partial, will not be authorized to obtain additional frequencies for that same system for a period of one year from the date of assignment.

4. Section 90.611 is amended by revising paragraph (c) to read as follows:

§ 90.611 Processing of applications.

* * * * *

(c) Each application will be reviewed to determine whether it can be granted. Applicants for frequencies in the Public Safety, Industrial/Land Transportation, Business, and General Categories must specify the intended frequency (or frequencies) of operation. Applicants for frequencies in the SMRS Category may either specify the intended frequency (or frequencies) of operation in accordance with the provisions of § 90.621 or request the Commission to perform the selection.

* * * * *

5. Section 90.615 is amended by revising the section heading; revising the existing text and making it paragraph (a); and adding a new paragraph (b) to read as follows:

§ 90.615 Frequencies available in the General Category.

(a) Frequencies in the 806-809.750/851-854.750 MHz bands (Channels 1-150) are allocated to the General Category for conventional operations. The frequencies are available to all eligibles under this subpart (see § 90.603) for conventional operations in areas farther than 110 km (68.4 miles) from the US/Mexico border and farther than 140 km (87 miles) from the US/Canada border.

(b) Frequencies in this category may also be used for trunked operations in these same areas in accordance with the following:

(1) Entities may employ unlicensed General Category frequencies to establish new trunked systems provided there are no 800 MHz and 900 MHz frequencies available in their service category.

(2) Conventional licensees may combine channels to form a trunked system provided each of the licensed systems being combined is constructed and operating. All frequencies being trunked together must be located at a primary site.

(3) General Category frequencies may be used for trunked system expansion in accordance with § 90.621(g).

6. Section 90.621 is amended by revising paragraphs (a), (c), (d), (e) and (h); revising the introductory text in paragraph (g); redesignating existing paragraphs (g)(3), (4), and (5) to (g)(4), (5), and (6), respectively; and adding a new paragraph (g)(3) to read as follows:

§ 90.621 Selection and assignment of frequencies.

(a) Applicants for frequencies in the Public Safety, Industrial/Land Transportation, Business, and General categories must specify on the application the frequencies on which the proposed system will operate pursuant to a recommendation by the applicable frequency coordinator. Applicants for frequencies in the SMRS Category may either request specific frequencies by including in their applications justification for the frequencies requested or may request the Commission to select frequencies for the system from the SMRS Category.

(1) * * *

(i) Channels will be chosen and assigned in accordance with §§ 90.615, 90.617, or 90.619.

(ii) * * *

(iii) There are no limitations on the number of frequencies that may be trunked. Except as indicated in paragraph (a)(1)(iv) of this section, authorizations may be granted for up to 20 trunked frequency pairs at a time in accordance with the frequencies listed in §§ 90.615, 90.617, and 90.619.

* * * * *

(c) Trunked systems authorized on frequencies in the Public Safety, Industrial/Land Transportation, Business, and General Categories will be protected solely on the basis of predicted contours. Coordinators will attempt to provide a 40 dBu contour at 20 miles and to limit co-channel interference levels at this distance to 30 dBu. This would result in a mileage separation of 70 miles for typical system parameters. Separations may be less than 70 miles where the requested service areas, terrain, or other factors warrant reduction. In the event that the separation is less than 70 miles, the coordinator must indicate that the protection criteria have been preserved or that the affected licensees have agreed in writing to the proposed system. Only co-channel interference between base station operations will be taken into consideration. Adjacent channel and other types of possible interference will not be taken into account.

(d) Conventional systems authorized on frequencies in the Public Safety, Industrial/Land Transportation, Business, and General Categories that have met the loading level necessary for channel exclusivity will be protected in the same fashion as described in paragraph (c) of this section.

(e) Conventional systems authorized on frequencies in the Public Safety, Industrial/Land Transportation, Business, and General Categories which have not met the loading levels necessary for channel exclusivity will not be afforded co-channel protection.

(f) * * *

(g) Frequencies in the 806-821/851-866 MHz bands listed as available for eligibles in the Public Safety, Industrial/Land Transportation, Business, General, and SMRS Categories are available for inter-category sharing under the following conditions:

(1) * * *

(2) * * *

(3) Channels in the General Category will be available to fully-loaded trunked Public Safety, Industrial/Land Transportation, Business, and SMR Category systems for expansion if there are no in-category 800 MHz frequencies available. Evidence must be provided that the applicant has sufficient users to warrant the authorization of additional channels. A licensee will be authorized no more than one channel more than its current loading warrants. Unused (unlicensed) channels in the General Category are also available to establish new trunked systems provided there are not sufficient in-category 800 MHz and 900 MHz frequencies available. The maximum number of frequency pairs that will be assigned at one time for new systems is five.

* * * * *

(h) Frequencies in the 896-901/935-940 MHz bands listed as available for eligibles in the Industrial/Land Transportation, Business, and SMRS Categories will be available for inter-category sharing to all persons eligible in those categories starting May 6, 1990, under the following conditions:

(1) The applicant must submit a statement from its own category coordinator that frequencies are not available in that category, and coordination is required from the applicable out-of-category coordinator.

(2) The out-of-category licensee must operate by the rules applicable to the category to which the frequency is allocated.

(3) For SMRs, the licensee will be authorized no more than one channel more than its current loading warrants.

7. Section 90.629 is amended by revising the introductory text to read as follows:

90.629 Extended implementation schedules.

Applicants requesting frequencies in the Public Safety, Industrial/Land Transportation, Business, and General Categories for either trunked or conventional operations may be authorized a period of up to three (3) years for placing a station in operation in accordance with the following:

* * * * *

FOOTNOTES

[1] Notice of Inquiry, PR Docket No. 87-213, 2 FCC Rcd 3820 (1987).

[2] Currently, above 800 MHz, trunking is permitted only on certain specified frequencies. *See* 47 C.F.R. §§ 90.615 - 90.621.

[3] *See* 47 C.F.R. §§ 90.615, and 90.617.

[4] *See* 47 C.F.R. §§ 90.621, 90.625, 90.631, and 90.633.

[5] Second Report and Order, Docket No. 18262, 46 FCC 2d 752 (1974).

[6] *See* Order, 43 Fed. Reg. 35,394 (1978).

[7] The Commission established waiting lists as a means of ranking applications that could not be granted at the time of filing but could be granted when and if frequencies later became available.

[8] SMR operators are entrepreneurs who offer communications services on a commercial basis to private radio eligibles. The SMR service was created to encourage a competitive private land mobile market, as well as to promote the use of trunking technology. *See* note 5.

[9] Second Report and Order, Docket No. 79-191, 90 FCC 2d 1281 (1982).

[10] The four service categories are Public Safety/Special Emergency, Business, Industrial/Land Transportation, and SMR.

[11] We recover or "take back" assigned channels from SMR licensees who fail to meet either the construction period or mobile loading requirements of Section 90.631 of the Rules. *See* 47 C.F.R. § 90.631.

[12] *See* Report and Order, PR Docket No. 86-160, 2 FCC Rcd 513 (1987). *See also* note 9, *supra*.

[13] Report and Order, Docket No. 86-404, 3 FCC Rcd 1838 (1988), 53 Fed. Reg. 12154 (1988).

[14] Report and Order, Gen Docket No. 84-1233, 61 RR 2d 165 (1986).

[15] A list of the commenting parties is provided in Appendix A.

[16] AAR comments at 3.

[17] API comments at 4.

[18] *See, e.g.*, UTC comments at 5.

[19] MST comments at 4-5.

[20] *See, e.g.*, APCO comments at 3.

[21] EIA comments at 9.

[22] *See, e.g.*, NABER comments at 15.

[23] The Inquiry solicited comments on whether licensees should be allowed to trunk on the 150 conventional channels at 800 MHz and under what circumstances, whether new trunked systems can be established on out-of-category channels obtained through intercategory sharing, whether existing licensees for conventional operations should be allowed to combine licensed frequencies and trunk those frequencies, and on the implications of allowing trunking in frequency bands other than 800 MHz. *See* Inquiry at 2 FCC Rcd 3820-3825.

[24] *See, e.g.*, NABER comments at 4-9.

[25] Theoretically, the efficiency of a trunked system increases as its number of channels increases.

[26] ASNA comments at 9.

[27] NABER comments at 11.

[28] SIRSA comments at 6.

[29] *See, e.g.*, Connecticut comments at 3.

[30] ASNA comments at 10.

[31] NABER comments at 12-13.

[32] SIRSA reply comments at 3.

[33] ASNA comments at 9.

[34] SIRSA reply comments at 4.

[35] GE comments at 4-5.

[36] Motorola reply comments at 3-4.

[37] There are exclusivity provisions for the 470-512 MHz band, but this spectrum is only available to private land mobile services in a limited number of metropolitan areas. *See* Subpart L of Part 90 of the Commission's Rules, §§ 90.301 *et seq.*

[38] Our primary objective is to provide some relief for SMR systems to obtain additional frequencies as they are by far the dominant users of trunked technology. The spectrum efficiency arguments in favor of expanding trunking, however, apply equally well to other trunked users.

[39] *See* 47 C.F.R. § 90.615.

[40] *See* 47 C.F.R. § 90.621(g).

[41] The Private Radio Bureau, however, has granted several waivers for trunked operation on these frequencies. *See*, for example, Sigma Telecommunication Waiver (DA 88-1064) adopted July 8, 1988. (Waiver granted where licensee has exclusive use of the conventional channel.) In light of action taken here, we do not plan to grant any requests filed during the pendency of this proceeding for waiver of our Rules to allow trunking on the conventional channels.

[42] *See* note 13 *supra*.

[43] *See* Report and Order, Docket 20909, 64 FCC 2d 825 (1977).

[44] *See* 47 C.F.R. § 90.621(g).

[45] In 1982 we adopted rules allowing eligibles in the three non-SMR Categories access to frequencies in each others' categories. We later extended the intercategory sharing rules to include eligibles in the SMR Category. *See* note 12 *supra*.

[46] Service category here refers to the four categories where the frequencies are grouped by eligibility rather than technology. The service categories are Public Safety, Business, Industrial/Land Transportation, and SMR.

[47] This policy is consistent with those adopted for intercategory sharing. *See* Memorandum Opinion and Order, Docket 86-160, 2 FCC Rcd 4292 (1987).

[48] *See* 47 C.F.R. § 90.621.

[49] The recognized frequency coordinators in this category are APCO, NABER, and SIRSA. NABER currently coordinates applications for SMRs on the 150 conventional frequencies. There is no certified frequency coordinator for the SMR Category.

[50] Only SMR base stations need to be coordinated.

[51] We recognize that this may involve additional coordination among these entities due to the potential for increased use of these frequencies. Because they now must coordinate between each other for conventional use of these frequencies, this additional effort should not be burdensome.

[52] The expiration date also will be used as the five year loading date unless the license being assigned is more than five years old in which case the assignment date will be used to determine the five year loading date. Note, however, that the channel recovery program is being phased out. *See* Report and Order, PR Docket No. 86-404, 3 FCC Rcd 1838 (1988).

[53] This criteria is discussed in paragraph 20, *supra*.

[54] *See* Memorandum Opinion and Order, Docket 79-191, 95 FCC 2d 477 (1983).

[55] *See, e.g.*, ASNA comments at 6.

[56] Exclusive use of an 800 MHz channel is obtained when the licensee "loads" at least 70 mobiles on the channel.

[57] Generally, all affected co-channel licensees means those stations located within 70 miles.

[58] In Re Application of Bill Welch, FCC 88-338, released November 14, 1988.

[59] *See* H.R. Report No. 97-765, 97th Cong., 2d Sess. 53 (1982).

[60] *See* Report and Order, 3 FCC Rcd 1838 (1988) at para. 48.

[61] Existing conventional users licensed on frequencies in one of the service categories are already allowed to group together and form a new trunked system. *See* 47 C.F.R. § 90.617.

[62] The new trunked applicant should go through the coordinator of the category in which the conventional systems being combined are allocated. If more than one category is involved, then the applicant should pick one of the certified coordinators.

[63] Seventy mobiles assigned to a channel represents a fully loaded channel. The 280 mobile figure therefore refers to four fully loaded channels. We generally allow licensees seeking to expand one channel more than their current loading calls for.

[64] This proposal applies to all intercategory sharing combinations in the five categories. *See* 47 CFR § 90.621.

[65] Entities applying in the Public Safety, Business, or Industrial/Land Transportation Categories may, under certain conditions, use each other's frequencies to establish new systems. Use of out-of-category frequencies by trunked SMRs, however, is limited to system expansion.

[66] The 800 MHz public safety category referred to here is the 70 channels listed in 90.617(a), Table 1. *See* 47 C.F.R. § 90.617(a).

[67] Intercategory sharing between these two categories is scheduled to start May 6, 1990.

[68] In most cases, trunked equipment available from one manufacturer is incompatible with that available from another manufacturer.

[69] We note our inquiry into trunking compatibility standards in the public safety 800 MHz bands. This inquiry, however, was initiated because of our concern about interoperability of public safety radio systems. We do not find these concerns applicable outside the public safety area. *See* Notice of Inquiry, Docket 88-441, 3 FCC Rcd 5399 (1988).

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO DISSENTING IN PART

Re: Trunking in the Private Land Mobile Radio Services for more effective and efficient use of the spectrum (PR Docket No. 87-213).

By adopting the Notice of Proposed Rule Making the Commission is moving in the right direction by proposing to allow more spectrum efficient technology in the 800 MHz bands. I will review carefully the comments in response to this proposal.

I do have concerns regarding the proposal to allow the buying and selling of conventional channels on a for-profit basis. As I have stated on previous occasions, I believe the use of economic means to manage private land mobile radio spectrum is inconsistent with amendments of the Communications Act. (*See*, H.R. Rep. No. 765, 97th Cong. 2d Sess. 53 (1982); *Report and Order*, PR Docket No. 86-404, 3 FCC Rcd 1856, 1858 (1988)). I ask that commenters address the issue of how buying and selling spectrum in the private land mobile radio services comports with amendments to the Communication Act.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-494

In the Matter of

Regulatory Policies and
International Telecommunications

ORDER ON RECONSIDERATION

Adopted: December 12, 1988; Released: January 4, 1989

By the Commission:

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I. INTRODUCTION

A. Notice of Inquiry and Proposed Rule Making

1. On December 23, 1986, we adopted a *Notice*[1] in this Docket initiating an inquiry and Rule Making proceeding to determine whether the public interest requires that we consider the telecommunications policies of foreign governments in the formulation of U.S. regulatory policies. In the *Notice*, we stated that we believed such an assessment was required for several reasons. First, a substantial portion of all economic activity is now global in scope and involves the collection, analysis, and dissemination as well as transportation, of information. As a result, telecommunications plays a critical role in our nation's development as our economy becomes increasingly dependent on growth and innovation in advanced telecommunications and related technologies. Second, relatively recent developments in the U.S. telecommunications marketplace, including the continuing implementation of our pro-competitive policies and the Bell System divestiture, provide foreign firms with many opportunities to compete on equal terms with U.S. firms in telecommunications and related domestic markets. Finally, in many other countries U.S. telecommunications firms are not permitted to operate at all or are not provided with a fair opportunity to compete.

2. The *Notice* emphasized that the U.S. government has become increasingly concerned that these foreign telecommunications policies, regulations, and practices restrict entry of, or discriminate against, U.S. firms and observed that the most immediately apparent effect of such foreign restrictions on U.S. telecommunications firms may be in the trade area, with the U.S. position in telecommunications trade deteriorating from a surplus position from 1975 to 1983 to a deficit position from 1984 to the present.[2] The *Notice* made it clear, however, that this Commission's concern with the restrictive policies and practices of foreign governments is not motivated solely, or even principally, by the effects these practices have on U.S. firms or the U.S. trade relationship with other countries. Rather, the *Notice* stated that our primary concern is the actual and potential effect of restrictive foreign telecommunications policies and practices on our ability to achieve the efficiency, equity, and national security goals set forth in the Communications Act.

3. To provide an analytical framework for the fundamental policy review we wished to undertake, the *Notice* was divided into two parts -- an inquiry and a proposed Rule Making. The inquiry portion of the *Notice* focused on the development of an "international model" that would represent an ideal to be sought in international telecommunications and a benchmark against which international and national policies and practices could be evaluated. Specifically, we proposed, and sought comment on, the development of an international model based on four objectives: (1) open entry; (2) nondiscrimination; (3) technological innovation; and (4) international comity. The inquiry portion of the *Notice* also sought comment on what actions we can, and should, consider to advance these four objectives, including the possibility of actions that might serve to limit access to the

U.S. market for foreign-owned firms from jurisdictions that are "closed" to U.S. telecommunications service providers and equipment manufacturers. We emphasized, however, that our intention was to provide a fair opportunity for all firms to compete in international telecommunications, rather than to "close" the U.S. market to all foreign firms. Therefore, the inquiry portion of the *Notice* also encouraged parties to comment on possible regulatory proposals that would further liberalize access to the U.S. market and thereby offer incentives to foreign administrations to open their markets to U.S. telecommunications service providers and equipment manufacturers. We stated, however, that we were well aware that any proposed regulations serving to limit access of foreign-owned firms to the U.S. market could have important trade, commercial, foreign policy, antitrust, labor, and national security implications. Consequently, the inquiry portion of the *Notice* invited parties to comment on whether we should rely primarily upon an executive branch determination that specific foreign markets are closed to U.S. telecommunications firms.

4. The Rule Making portion of the *Notice* focused on whether the Commission and other U.S. government policymakers currently have sufficient information to determine fully the extent to which foreign telecommunications entities from countries engaging in restrictive practices adversely affecting U.S. firms have benefited from the liberalization of the U.S. telecommunications market. We tentatively concluded that our current rules do not provide us with sufficient information and therefore proposed, and sought comment on, rule changes that would provide us with information concerning the activities of foreign-owned common carriers, enhanced service providers, and telecommunications equipment manufacturers in the U.S. market. We proposed the following rule changes: (1) the institution of a reporting requirement for foreign-owned carriers providing common carrier services within the U.S.; [3] (2) a recommendation by the Commission to the Department of State that the U.S. adopt a mandatory Recognized Private Operating Agency (RPOA) certification policy for enhanced service providers; (3) the establishment of an annual procurement reporting requirement for carriers concerning the nature and extent of their purchases of core equipment from foreign-owned manufacturers during the preceding year, as well as their planned purchases of such equipment for the coming year; and (4) the institution of a requirement that foreign-owned manufacturers provide annual reports of all sales of equipment registered under Part 68 of our rules. The Rule Making portion of the *Notice* tentatively concluded that the proposed information reporting requirements would permit us to make a more accurate assessment of the degree to which foreign entities participate in the U.S. market and whether we should proceed with a further notice of proposed Rule Making on the issues raised in the inquiry portion of the *Notice*.

B. Report and Order and Supplemental Notice of Inquiry

5. On February 25, 1988, we adopted a *Report and Order* and *Supplemental Notice of Inquiry* [4] affirming our tentative view that we must augment our ability to monitor developments in domestic and international telecommunications and must continue to work with the executive branch and the Congress to promote a more competitive international telecommunications environment that will best serve the statutory goals of providing for efficient and equitable telecommunications services at just and reasonable rates. The *Order* reaffirmed our tentative view that we require additional information on the U.S. core equipment market and established annual procurement reporting requirements for Tier I local exchange carriers and all interexchange carriers having more than $100 million in annual revenues. The *Order* also reaffirmed our tentative view that we require additional information on the U.S. common carrier services market and adopted information reporting and notification requirements for carriers owned by foreign telecommunications entities that offer domestic, long-distance telecommunications services within the U.S.

6. The *Order* declined, however, to adopt reporting requirements for registrants of customer premises equipment under Part 68 for several reasons. First, in contrast to the annual procurement reports, many firms registering CPE under Part 68 are small and the proposed reporting requirement could prove burdensome. Second, under the terms of the Part 68 registration program, manufacturers or distributors of CPE could simply evade the registration requirement through the use of protective coupling devices. Third, country-of-origin determinations would be particularly difficult for CPE in light of the fact that much of this equipment consists of components manufactured in one or more countries and assembled in yet another country. Fourth, the U.S. Customs Service already maintains detailed tariff schedules for all items imported into this country.

7. The *Order* also declined to establish reporting requirements for foreign-owned enhanced service providers operating within the U.S. or to and from the U.S. and foreign points. The *Order* noted the strongly held views of U.S. enhanced service providers that the adoption of the proposed reporting requirements would not serve to advance their interests or those of their customers in either domestic or international markets. The *Order* also relied on the opposition of the Department of State to the mandatory RPOA proposal, and found convincing its arguments that, at present, the costs of this approach outweigh its benefits. The *Order* concluded that our activities should focus on continuing the development of competitive opportunities for enhanced service providers in the U.S., refining the regulatory provisions we have established for the offering of enhanced services by communications common carriers, pursuing pro-competitive policies that lower the cost and the price of basic international telecommunications services, and promoting liberalized policies for international enhanced services in multilateral and bilateral forums.

C. Paperwork Reduction Act

8. The *Order* stated that we had analyzed the reporting requirements for the provision of common carrier services by foreign-owned carriers in the United States and the procurement of core equipment by common carriers in accordance with the provisions of the Paperwork Reduction Act of 1980.[5] The *Order* emphasized that we made modifications to the original proposal set forth in the *Notice* in order to limit the administrative burden associated with these reporting requirements.[6] The *Order* also made clear that any proprietary information filed pursuant to the *Order* would be protected under 47 C.F.R. Section 0.459(a). On March 29, 1988, we submit-

ted our request for coordination to OMB for approval of the information reporting requirements set forth in the *Order*.

9. On May 20, 1988, OMB informed this Commission of OMB's proposed disposition of our request.[7] Specifically, OMB stated that our request was "improperly submitted" and that OMB could not consider the request in its present form for either approval or disapproval. OMB asserted that the Supporting Statement we submitted stated only that a Commission official has been delegated authority to provide details of the reporting requirement and did not include a copy of the information collection instrument to be used. OMB further alleged that our annual procurement and common carrier services reports were not specific as to the actual data elements to be included and, as a result, we had not provided OMB with sufficient information with which to evaluate the request. OMB asserted that we must resubmit the request and that OMB review would not begin until the resubmission is received.[8] OMB stated that in the resubmission, we should provide the actual questionnaire that will be used. OMB referenced its March 19, 1987, letter and the concerns expressed in that letter regarding confidentiality and administrative burden. OMB observed that the supporting statement indicated that respondents would be able to solicit confidential treatment and that this was an adequate response. OMB stated that it continues to be concerned whether the information requested is maintained in the form requested.[9] OMB argued that we have only stated that we will collect the necessary information in a manner that is consistent, to the extent possible, with existing intra-corporate information collection procedures; and that the Commission makes no showing as to what this manner is. OMB asserted that failure to resolve this second matter would be grounds for OMB disapproval under 5 C.F.R. § 1320.1(g), and in its present form this request would be disapproved. OMB added that it believes that this Commission, in setting these requirements, has gone beyond the scope of its statutory authority, and that we could not and must not take action, even with respect to information collection, on trade policy grounds. OMB stated that in the present context it questions whether the information collection is necessary for the proper performance of this Commission's functions and OMB cites 5 C.F.R. § 1320.4. In addition, OMB asserted that it believes we are proposing an inconsistent course of action by, on the one hand, investigating whether foreign countries impose discriminatory requirements on U.S. firms and, on the other hand, conducting this investigation by imposing a discriminatory requirement on U.S. firms. OMB stated that this approach appears to prejudice our investigation and urged us to reconsider our action before submitting our request for OMB approval.[10]

II. CORE EQUIPMENT

A. Report and Order

10. The *Order* established annual procurement requirements for Tier I local exchange carriers,[11] their holding companies, their affiliates, and all interexchange carriers having more than $100 million in annual revenues. The *Order* stated that these reports should include a listing of purchases by the reporting company, by name of manufacturer or supplier, of aggregate purchases in dollars of switching and transmission equipment. The *Order* further concluded, however, that we should impose a "sunset" provision --that is, that the annual procurement reporting equipment would expire after three years absent a specific determination by this Commission that an extension of this requirement is appropriate. We emphasized our belief that this approach established an appropriate balance between our need to ensure that we obtain sufficient information from carriers subject to our jurisdiction under the Act on the nature and extent of foreign participation in the U.S. market and the need to limit the administrative burdens placed on carriers. In order to limit further the administrative burdens that may be placed on the carriers as a result of these reporting requirements, however, and in order to address the specific concerns raised by OMB, we delegated to the Chief, Common Carrier Bureau, the authority to develop the reporting requirements and to collect the necessary information in a manner that is, to the extent practicable, consistent with existing intra-corporate information collection procedures. Furthermore, while we noted that there is a well-defined regulatory scheme for the treatment of confidential material, we adopted Bell Atlantic's proposed modification and declined to require that reporting carriers provide procurement information for the next calendar year. In addition, we emphasized that we would work with the reporting carriers, if they so desire, to develop a format for our public reports in carrier procurement during the preceeding year that aggregates individual company data in a fashion that preserves confidentiality and at the same time, provides the executive branch, the Congress and the public with useful information concerning the extent to which firms from countries "closed" to U.S. firms participate in the U.S. core equipment market.

11. The *Order* again concluded, however, that it would be premature for this Commission to address whether the public interest requires some form of additional regulatory action by this Commission. Moreover, the *Order* restated our belief that any Commission action that would serve to limit access to the U.S. core equipment market would raise a number of serious trade, investment, commercial, defense, and foreign policy considerations that could affect U.S. obligations under a variety of bilateral and multilateral agreements. As a result, we invited parties to submit additional comments on the most appropriate procedural mechanism or mechanisms for Commission consideration of the regulatory implications of restrictive foreign standards-setting practices and procurement procedures on the price, variety, quality, and technological sophistication of telecommunications equipment used to provide telecommunications services to U.S. consumers. In particular, we invited parties to comment on whether we should consider specific actions in this area only in the context of a Rule Making that would focus on the public interest considerations of such action under the statutory mandate set forth in the Communications Act. We also invited additional comments on the proper role of the executive branch, including whether we should consider, propose, or take action that might involve restricting the participation of foreign-owned firms in U.S. telecommunications equipment markets only after some specified determination by the President, or his designated representative, based on U.S. trade, investment, commercial, defense, and foreign policy considerations.

B. Positions of the Parties

1. Reporting Requirements

a. Petitions for Reconsideration and Clarification

12. NTIA,[12] Siemens Capital Corporation (Siemens), and BellSouth Corporation (BellSouth) filed petitions for reconsideration and the GTE Telephone Companies (GTE) filed a petition for clarification of various aspects of the Commission's decision to establish annual procurement reporting requirements. NTIA requests that the Commission reconsider the reporting requirements and amend our ruling to ensure consistency with our proper functions. NTIA asserts that despite an executive branch admonition that the Commission does not have the authority to act independently on trade policy grounds, most of the rationale given for the annual procurement reporting requirements is in NTIA's view, clearly trade related and leaves the clear implication that the Commission might in the future consider using this information for trade purposes. NTIA states that while the Commission did not take any overt trade action, and the gathering of information is, as a general matter, well within the authority and normal practice of the Commission in carrying out our responsibilities under the Communications Act, the broad language used in the *Order* exceeds our statutory authority, improperly interferes with trade policy responsibilities of the executive branch, and fails to adequately account for the Administration's comments filed in opposition to the original *Notice*. NTIA states that further detailed consultation with the executive branch would have clarified these "problems" and that the justification set forth in the *Order* for the annual procurement reports raise serious concerns. NTIA states that before taking action in this docket, the Commission should have justified such action on the basis of the Communications Act, and not on the basis of trade policy, which is formulated by the executive and legislative branches.

13. Siemens asserts that we have no legitimate role to play in retaliating against telecommunications manufacturers from allegedly "closed" foreign markets, and that the collection of data to determine if the Commission should become involved in such complex trade issues is beyond the Commission's authority. Siemens states that the Commission has no statutory authority to take punitive actions against foreign manufacturers because of the agency's dissatisfaction with the trade policies of their home nations. Siemens observes that this Commission already has access to a wealth of information on imports collected by the Customs Service and that the annual procurement reports will unnecessarily duplicate information available elsewhere. Siemens also states that the annual procurement report, at least in their current forum, will create a misleading and inaccurate picture of the U.S. market since there is no provision for determining the country in which the manufacture of the core equipment is located. Siemens states that reliance on the name of the manufacturer or supplier ignores both the global nature of the operations of a significant number of companies involved in the core equipment manufacturing field and the different loci for the manufacturing of component parts. Siemens argues that the Commission should adopt specific amendments that require the identification of the location of the manufacturer of the products being reported. Siemens observes that several benchmarks already exist for making this determination under U.S. law and argues that these existing benchmarks would provide a more accurate and useful picture of foreign involvement in the domestic core equipment market than the current approach.

14. Siemens adds that the Commission has not demonstrated, or even suggested, a basis for concluding that closed foreign markets prevent the achievement of economies of scale or scope necessary for the continued viability of domestic manufacturers. Siemens asserts that even if significant harm to domestic manufacturers was established, no harm to consumers could be shown since low price, high quality goods would still remain available so long as U.S. markets remain competitive. Siemens argues that the *Order* did not establish a nexus between the annual procurement reports and the Commission's regulatory objectives. Siemens argues that the reporting requirements are more likely to have the effect of imposing higher prices and more inefficient provision of service by inhibiting domestic customers from purchasing foreign products regardless of price or quality considerations and contends that, at least in the central office switch market, for all practical purposes this could have the effect of creating a monopoly for AT&T in the switch market.

15. BellSouth argues that annual procurement reports should not include core equipment purchased by the holding companies and affiliates of Tier I local exchange carriers. BellSouth states that there was no notice that non-carriers were to be included within the scope of the rules and that there is no record to support inclusion of non-carriers in the reporting requirement. BellSouth observes that the *Notice* expressly defined core equipment as switching and transmission equipment used in the provision of network services by common carriers. Moreover, BellSouth argues that by extending the reporting requirements to non-carrier affiliates of Tier I LECs, the Commission would receive irrelevant information such as core equipment purchased to provide service abroad. BellSouth adds that reporting requirements would place a burden on many non-carrier affiliates that are significantly smaller than carriers the Commission has already exempted.

16. GTE seeks clarification of the annual procurement reporting requirement to remove uncertainties as to the data to be submitted. GTE asserts that without clarification, Tier I LECs may mistakenly believe that they are required, for example, to report purchases of either purchases for large private switching systems, or purchases of voice store and forward equipment by an enhanced service affiliate. GTE states that purchases from internal suppliers performing only a distribution function, or data not sought by the Commission (such as purchases by exchange carriers, non-regulated affiliates employed for satellite, cellular or air-to-ground transmission, or purchases of network switching and transmission equipment by an exchange carrier's foreign telephone company affiliates), would be of no real value to the Commission. Specifically, GTE requests that the Commission clarify the annual procurement scope of the reporting requirement established in the *Order* by: (1) defining network switching and transmission equipment as central office equipment in line with the definition provided under Section 31.221 of the Commission's rules in effect during 1987 and as defined by the equivalent repair and inventory accounts of 1987;[13] (2) defining "purchased material" to include various additional charges levied by the manufacturer or supplier when the purchases embrace such services as engineering, installation and transportation; and

(3) that the period for the first report cover purchases recorded for payment or recorded as sales to a supply affiliate in the calendar year 1987. GTE also requests that the Commission clarify that Section 63.801(b) requires one consolidated report for a number of LECs owned by a single holding company and that the report simply list the manufacturer/supplier, without address.[14] GTE adds that the reports should include a column listing annual amount of central office equipment, but that annual purchases that are less than $100,000 should not be included in order to avoid large numbers of suppliers of immaterial amounts. Finally, GTE argues that appropriate and supported requests for confidentiality should be duly granted.

b. Comments

17. Digital Equipment Corporation (DEC) supports the petitions for reconsideration of the annual procurement reporting requirements. DEC argues that the Commission does not have legal authority to require carrier reports for trade purposes and that the Commission must show some logical nexus between our jurisdiction under the Communications Act and the decision to establish reporting requirements. DEC asserts that the *Order* fails to provide the basis for a complete and meaningful assessment of the U.S. industry and its ability to provide efficient services at a reasonable cost. DEC believes that the information sought cannot reasonably be expected to provide the basis for an assessment of the effect of foreign practices on the efficient provision of U.S. services. DEC asserts that the information necessary to establish a comprehensive profile of the nature and extent of foreign participation in the U.S. core equipment market can be attained through the use of import data collected by the Bureau of Census and reported on a monthly basis to the Department of Commerce. DEC also argues that the International Trade Commission (ITC) has the authority to undertake studies that relate to a particular industry and an ITC study would be a far more appropriate and efficient means of determining the level of foreign competition in the core equipment market and its impact on the U.S. industry than the reporting requirements adopted by the Commission. DEC also argues that the annual procurement reporting requirements may be vague and overbroad, yield a misleading picture of the domestic marketplace, and that the reference to core equipment is undeveloped and too imprecise to produce useful information. DEC argues that the *Order* misperceives the modern telecommunications network and that switching functions can no longer be thought of as being resident in a particular piece of central office hardware. DEC also expresses concern that the reporting requirement could reveal a manufacturer's arrangements for developing and supplying central office support systems and provides that only carriers, and not manufacturers, may request protection. DEC argues that even the "threat" of such disclosure could create disincentives to entreprenuerial approaches to network technology, or adversely affect unregulated companies entering the core equipment marketplace. As a result, DEC argues that the Commission should either abandon the core equipment reporting requirements or initiate further proceedings to precisely define the objectives, scope, and content of the reports.

c. Reply Comments

18. The Commission of the European Communities (EC) and BellSouth filed reply comments concerning the annual procurement reports. The EC expresses concern that the information gathered as a result of the reporting requirements placed on U.S. carriers with regard to their purchases may be used as a basis for unilateral trade policy decisions in a narrow sectoral context. The EC also expresses concern that the reporting requirements may themselves have an inhibiting effect on trade if U.S. carriers consider that their purchases, including servicing, are subject to detailed and regular Commission scrutiny. The EC states that it expects the U.S. government to ensure that U.S. telecommunications policies are consistent with U.S. international obligations and do not have adverse effects on purchases by U.S. firms. BellSouth states that, as a result of the showings made by BellSouth and others in their petitions for reconsideration and clarification, the Commission should reevaluate the need for the annual procurement reports required of local exchange carriers in this proceeding.

2. Procedural Mechanism for Consideration of Trade Issues

a. Comments

19. NTIA, Siemens, Southwestern Bell, BellSouth, Contel, Computer and Business Equipment Manufacturers Association (CBEMA), and the Communications Industry Association of Japan (CIAJ) filed additional comments on the most appropriate procedural mechanism or mechanisms for Commission consideration of the implications of restrictive foreign standards-setting practices and procurement proceedings on the price, variety, quality and technological sophistication of telecommunications equipment used to provide telecommunications services to U.S. consumers.

20. NTIA restates that the authority to formulate and implement U.S. trade policy is properly the domain of the executive branch. NTIA emphasizes that it continues to oppose any interpretation of this Commission's authority that would allow for independent regulatory action based on trade policy grounds. NTIA reasserts that actions taken by the Commission must be predicated on its authority under the Communications Act and based upon communications policy grounds. NTIA recognizes, however, that many issues of communications policy could have an appreciable impact on international trade and therefore reaffirms its earlier suggestion that the Commission establish a mechanism for obtaining the views of the executive branch whenever the Commission believes it is considering actions that could have an appreciable impact on U.S. trade interests. NTIA believes that such a process would provide effective executive branch guidance with respect to the possible trade implications of Commission actions. NTIA states that a Commission request for the executive branch's views and guidance on the trade implications of the proposed action should be sent to NTIA and that NTIA, in turn, would relay the information to USTR. USTR would coordinate this information through the Trade Policy Committee Staff (TPSC), prepare comments on Commission actions, and relay the TPSC-developed report to NTIA for NTIA to transmit to the Commission.

21. NTIA recognizes that information on network procurement collected in the normal course of business, such as the degree of penetration of the U.S. market by core

equipment manufacturers, the degree of penetration by the U.S. of foreign markets, or the comparative degree of foreign versus national preferred supplier sales of core equipment in foreign markets, could be useful to the conduct of U.S. trade policy. NTIA urges that the Commission therefore establish a process to ensure that any information gathered in the legitimate fulfillment of the Commission's telecommunications regulatory responsibilities is made available, to the extent allowed by law, to the appropriate executive branch agency. NTIA states that in cases where the Commission believes the information it has gathered would be useful to the executive branch in its conduct of U.S. trade policy, such information should be transmitted to NTIA, which will then distribute that information to the Chair of the TPSC for distribution to its members. NTIA states that in addition to the formal advice process, agencies may informally provide executive branch views to the Commission on trade policy issues, including the potential impact of regulatory initiatives on present and future bilateral or multilateral negotiations or consultations, or other related activities, at the request of the Commission or at the executive branch's initiative. NTIA observes that the executive branch views would be developed by the USTR in coordination with the TPSC member agencies. NTIA states that such opportunities for formal and informal executive branch input may improve both the Commission's appreciation of the trade impact of its regulatory actions and the executive branch's awareness of contemplated Commission actions.

22. BellSouth states that the primary responsibility for securing access to world markets for U.S. exporters lies in the hands of the President and the USTR. BellSouth agrees with the suggestion in the *Notice*, however, that if the Commission considers specific actions, it should do so in a Rule Making proceeding that addresses the policy implications of such action, as well as whether such action is consistent with the Commission's statutory mandate. BellSouth asserts that such a proceeding should be instituted only after a preliminary determination has been made by the President or the USTR that Commission action is appropriate in light of U.S. trade, investment, commercial, defense, and foreign policy considerations and emphasizes that continuing coordination with the executive branch and Congress is vital in order to minimize the possibility that telecommunications issues will be viewed in a vacuum.

23. Contel states that the Commission is without the requisite specific or ancillary authority to impose reciprocal regulation in international telecommunications trade, and that any such action would violate U.S. obligation under existing international agreements. Contel cautions that such an approach would impose artificial restraints on carriers and impede their ability to select the most suitable and lowest cost telecommunications equipment available to meet the needs of their subscribers.

24. CBEMA expresses concern that the adoption of policies that might restrict access of foreign firms to U.S. telecommunications markets could have a significant adverse effect on overall U.S. efforts to open foreign markets and on competition in U.S. markets. CBEMA asserts that the executive branch has primary responsibility for addressing telecommunications trade problems and that the Commission's proper role should be to continue to provide expert assistance to the appropriate executive branch authorities involved in telecommunications trade negotiations. CBEMA notes that the trade bill specifically requires that the Commission submit to the Congress the data it collects pursuant to the reporting requirements set forth in the *Order* and that the Commission consult with the Secretary of Commerce in the preparation of a study of the competitiveness of the U.S. telecommunications industry. CBEMA believes that the Commission, with its expertise in the industry, currently can fulfill these responsibilities and that no additional procedures are necessary at this time.

25. Southwestern Bell believes that the Commission, as the federal agency with expertise in the field of telecommunications, should have an input in the trade policy process, but at the request and direction of the executive branch. Southwestern Bell argues that the Commission should not act unilaterally or as an independent trade policymaking body. Southwestern also notes that under existing judicial and regulatory restraints, the Regional Bell Operating Companies (RBOCs) are prohibited from manufacturing or engaging in the research and development of telecommunications products or customer premises equipment and, as a result, the RBOCs must be able to consider both foreign and domestic sources of supply in order to obtain the best available equipment. Southwestern Bell states that unless the Commission has evidence that the cost or quality of equipment obtained from foreign sources is adversely impacting domestic telecommunications services, it ought not unilaterally impose regulatory restraints upon the availability of such equipment. Southwestern Bell also expresses concern that restrictions on foreign procurement would place the RBOCs and their affiliates at a competitive disadvantage in markets where the competition is not similarly restricted and that such restrictive regulatory policies would represent a dramatic reversal of previous Commission efforts directed towards promoting competition in telecommunications markets.

26. Siemens restates that the Commission has not established the factual predicates necessary to establish its jurisdiction to take trade actions and that the record in this proceeding is inadequate to demonstrate that U.S. consumers are being deprived of quality telecommunications services at reasonable prices. Siemens adds that the Commission has not made any attempt to determine or demonstrate the importance or effects on the U.S. market of the economies of scale and scope that serve as the lynchpin of possible harm to U.S. consumers. Siemens argues that without a reasonable basis for finding of such harm, the Commission has neither the jurisdiction, nor the public interest justification, to take unilateral action that would restrict access to the U.S. markets. Siemens states that nor can the Commission justify action to open foreign markets on the basis that the loss of domestic manufacturing capability would harm U.S. national security. Siemens asserts that as long as competition in telecommunications equipment markets exists, producers will have an incentive to innovate and to produce high quality and low cost products for domestic U.S. consumption. Siemens notes that, given the large number of competitors in each of the telecommunications equipment markets of concern to the Commission, the loss of even a significant number of domestic manufacturers would not render these markets non-competitive.

27. Siemens asserts that current trade and other laws provide ample authority to the President and the executive branch to protect national security interests. Siemens also argues that the provisions of the omnibus trade bill

place responsibility for the formulation and implementation of U.S. trade policy in the executive branch and that Congressional rejection of the amendment that would have granted the Commission trade authority provides compelling evidence that the Communications Act does not confer trade authority. Siemens states that the considered judgment of the Congress that telecommunications trade policy making should be the responsibility of the President and USTR, and not the Commission, should be accorded great weight. Siemens asserts that Rule Making procedures are particularly inappropriate for policymaking in the international trade field since the negotiation of an international trade agreement is a dynamic process and the time lag inherent in Rule Making procedures virtually guarantees that resulting actions would be out of step with current developments. Siemens also states that Commission action to impose standards for the interconnections of terminal equipment in foreign markets is neither necessary or desirable, and observes that efforts to liberalize the German telecommunications market are significant and ongoing. As a result, Siemens concludes, this proceeding should be terminated without further action.

28. CIAJ describes additional recent progress in the opening of the Japanese marketplace to foreign manufacturers and service providers, including pocket pagers, cellular telephones, NTT procurement, Daini-Denden procurement, telecommunications satellites, Kansai International Airport, international VANS, telecommunications terminal devices, and radio communications services and equipment. CIAJ argues that the Commission's role in trade matters should be limited to providing information and advice to the executive branch and that the Commission should not assume an independent role in telecommunications trade matters. CIAJ states that the Commission has played a useful role in providing expertise and advice on telecommunications matters to the executive branch in international trade negotiations, including the MOSS talks between U.S. and Japan, the Uruguay Round, and U.S. government discussions with the European Community. CIAJ believes that it would be difficult to identify any procedural mechanism that the Commission could invoke to implement trade decisions that would not have a detrimental impact on the telecommunications and trade policy of this country and asserts that a Rule Making proceeding would preclude the give-and-take dialogue among countries that has proved vital to achieving progress on substantive trade issues.

b. Reply Comments

29. DEC, Southwestern Bell, and Motorola, Inc. (Motorola) submitted reply comments on the most appropriate procedural mechanisms for Commission consideration of the implications of restrictive foreign practices on the price, quality and technological sophistication of telecommunications equipment used to provide telecommunications services to U.S. consumers. DEC states that U.S. domestic telecommunications policy has created the opportunity for the evolution of the world's best telephone system and for the export of U.S. technology, products, services and knowledge. DEC states that the Commission should not attempt to establish or implement telecommunications trade policy and expresses concern that trade-related initiatives may have an adverse impact upon the realization of important telecommunications policy goals. DEC asserts that the development of an intelligent, open network architecture requires the competition between innovative manufacturers with the requisite network expertise. DEC argues that this requisite network expertise is not limited to U.S. companies. DEC emphasizes that the use of the Part 68 certification as leverage over foreign administrations would directly conflict with the existing Administration trade policy and could seriously undermine delicate bilateral and multilateral discussions.

30. Southwestern Bell states that the comments indicate virtual unanimity for the concept that trade issues are primarily the responsibility of the executive branch and that the Commission should refrain from taking a unilateral, independent role in trade policy-making activities. Southwestern Bell also states that if the Commission proceeds with the annual procurement reporting requirements, the Commission should develop a format for its public reports in an open forum that ensures the preservation of confidentiality.

31. Motorola commends the Commission for identifying and attempting to address the serious and complex telecommunications-related problems raised in this proceeding, as market-protecting policies and practices of foreign governments exist and may inhibit fulfillment of the Communications Act objectives. Motorola asserts that measures need to be adopted to discourage the establishment and perpetration of such practices, but that it is clear that the Commission does not propose unilateral or independent formulation or implementation of U.S. trade policy. Motorola states that the Commission should coordinate with the executive branch on a routine basis to further U.S. trade policy objectives and that it is prudent and necessary to equip the Commission to act at the discretion of USTR, to promote access to foreign telecommunications markets equivalent to that enjoyed by foreign firms in the U.S. today, including land mobile equipment.

C. Discussion

32. In the *Order*, we expressed our concern that the restrictive standards-setting practices and the "Buy National" procedures of foreign administrations could have a negative impact on both the competitiveness of U.S. telecommunications equipment manufacturers and on the U.S. telecommunications equipment trade deficit. We also expressed our concern that restrictive foreign telecommunications procurement policies and practices may result in higher prices for telecommunications equipment used to provide telecommunications services, including international telecommunications services originating or terminating in the United States. Moreover, we stated that in order to assist us in promoting more open and competitive international telecommunications equipment markets, and to provide information to the Congress and the executive branch concerning issues involving carriers subject to the Communications Act, we would establish an annual procurement reporting requirement. Subsequently, however, we postponed the filing deadlines for the annual procurement reports as a result of OMB's response to our request for co-ordination under the Paperwork Reduction Act.

33. In this *Order on Reconsideration*, we conclude that several factors lead us to believe that the abolition of the annual reporting requirement established in the *Order* will best serve the public interest. First, a new statutory scheme has been enacted by Congress in the time since our annual reports were established. The "Telecommuni-

cations Trade Act of 1988,"[15] explicitly addresses telecommunications trade issues; including the procurement of core equipment. In particular, the Telecommunications Trade Act clearly establishes that the U.S. Trade Representative (USTR) shall conduct an investigation to identify priority countries for negotiations, and nondiscriminatory procurement policies is specifically included as a primary negotiating objective of the United States.[16] Moreover, while Section 1380 of the Telecommunications Trade Act references our efforts in this proceeding to assist the Congress and the executive branch in their telecommunications trade policymaking efforts, it does not require that we gather information equipment solely for trade-related purposes.[17] In this context, we note that information on the competitiveness of the U.S. telecommunications industry is already available from other sources, such as the annual U.S. Industrial Outlook.[18]

34. Second, although we do not believe that there is any real question of our authority to require information concerning the procurement of core equipment by common carriers for the regulatory purposes,[19] we conclude on reconsideration that there is no compelling regulatory need to gather this information at the present time. Moreover, we are encouraged by the very positive reaction we have seen in response to our concern over growing net revenue outflow for IMTS services to countries that have "national champions" manufacturing telecommunications core equipment, such as West Germany[20] and Japan.[21] In particular, we note that the West German government has promised to reduce its collection rate for international telephone calls to the U.S. by approximately 15%.[22] Similarly, we note that the Japanese Ministry of Post and Telecommunications authorized a KDD request to reduce the accounting rate between the U.S. and Japan from $2.35 per minute to 1.34 standard drawing rights (SDRs) and to reduce Japanese IMTS collection rates to the U.S.[23] We believe that these actions represent important initial steps in moving accounting rates and collection rates for international telecommunications services closer to the costs of providing such services and should reduce the net revenue outflow to these countries.

35. Finally, we strongly support the purposes of the Paperwork Reduction Act and recognize OMB's concern that we seek to minimize the Federal paperwork burden for carriers subject to our jurisdiction.[24] Moreover, we believe that as a matter of policy we should not take action, including information collection, solely for trade purposes. As a result, with this *Order on Reconsideration*, we consider our examination of the trade issues associated with the procurement of equipment in this proceeding, including the potential collection of procurement information for trade-related reasons, to be completed.

III. COMMON CARRIER SERVICES

A. Report and Order

36. The *Order* adopted two rules with respect to common carrier services. First, the *Order* concluded that all foreign-owned carriers[25] offering interstate common carrier services within the U.S. must file revenue and traffic reports with the Common Carrier Bureau on a quarterly basis beginning July 1, 1988, with subsequent reports due on, or before, the 90th day after completion of the calendar quarter. Second, the *Order* concluded that all foreign-owned carriers that initiate domestic common carrier services within the United States after July 1, 1988, must notify this Commission within thirty days of their commencement of such service.

37. The *Order* noted that in establishing reporting requirements for foreign-owned carriers providing common carrier services within the United States we were concerned that smaller U.S. carriers and other U.S. firms, including U.S. separate satellite providers, are subject to explicit and implicit entry barriers and discriminatory treatment in foreign markets.[26] We also stated that we are increasingly concerned that international accounting rates[27] that are above-cost may adversely affect the achievement of three of the objectives raised in the *Notice* - open entry, nondiscrimination, and technological innovation. Indeed, the *Order* noted that high accounting rates and the depression of traffic volumes caused by high collection rates in certain other countries, may effectively serve as a barrier to entry for, or result in discriminatory treatment of, smaller, or newer, U.S. telecommunications service providers.[28] Moreover, the *Order* emphasized that the effect of restrictions on entry by, and discriminatory treatment of, U.S. carriers, and above-cost international accounting rates might be to raise the cost, and eventually, the price of international telecommunications services, originating and terminating in the United States.[29] As a result, we incorporated a *Supplemental Notice* into the *Order*, to make clear our concern that the relatively high level of international accounting rates may adversely affect U.S. consumers and to provide interested parties with an opportunity to comment on the cost characteristics of international accounting rates, the interrelationship of international accounting rates and national collection rates, and the potential implications of above-cost international accounting rates on U.S. market access concerns.[30]

B. Positions of the Parties

1. Reporting Requirements

a. NTIA Petition for Reconsideration

38. NTIA filed the only petition for reconsideration of the Commission's decision to impose notification and reporting requirements for foreign-owned carriers providing common carrier services within the United States. NTIA states that the Administration objects to the discriminatory nature of these reporting requirements that violate, in NTIA's view, the long-established principle of the U.S. that foreign investors shall be accorded national treatment. NTIA states that national treatment, as applied by the U.S. and the Organization for Economic Cooperation and Development (OECD), means that foreign companies are treated no less favorably than the "most" favored in the domestic market. NTIA argues that the *Order* mistakes the concept by relating it to treatment equal to the "least" favored and that the common carrier reporting requirements established in the *Order* clearly leave foreign-owned common carriers in a position worse than all other domestically owned firms with the exception of AT&T. NTIA asserts that this represents a direct conflict with U.S. policy. NTIA states that the *Order* ignores the fact that AT&T is the only domestic interexchange carrier in the United States that this Commission has determined to be a "dominant" carrier and, therefore, inappropriately compares the burden placed on non-dominant foreign-owned carriers with that placed on AT&T. NTIA argues that nondominant foreign-owned carriers logically should

be compared to other nondominant domestic carriers. Under this analytical framework, NTIA asserts that foreign-owned carriers are not being accorded the same treatment as similar U.S.-owned companies -- that is, foreign-owned carriers are not being accorded national treatment.

39. NTIA observes that national treatment for foreign investors is an important policy of the U.S. government that offers a critical protection for the more than $200 billion in U.S. foreign direct investment worldwide. NTIA states that national treatment offers a foreign investor protection against arbitrary applications of government policies in favor of so-called "national" firms. NTIA observes that such unrestrained discrimination undermines competition and decreases the commercial opportunities available to U.S. firms and can undermine the commercial value of market access.

40. NTIA states that the importance of national treatment as a principle for treating international investment flows was most recently stated in President Reagan's September 1983 Investment Policy Statement. NTIA asserts that this statement reaffirmed the strong support of the United States for the concept of national treatment as the cornerstone of international investment regimes and sets out a number of specific bilateral and multilateral initiatives. NTIA insists that national treatment is not a new policy for the United States and that, bilaterally, it has been a key position in our Contemporary Treaties of Friendship, Commerce and Navigation (FCNs). NTIA asserts that the language in these treaties, which cover many of our major economic relationships, typically provide that:

> "(n)ationals and companies of either party shall be accorded national treatment . . . . Moreover, enterprises which they control . . . shall in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by national and companies of such other party."[31]

NTIA also notes that in 1981 the U.S. initiated a Bilateral Investment Treaty (BIT) program to protect the interests of investors here and abroad and to introduce certainty and stability into the foreign investment process. NTIA observes that, as with the FCNs, national treatment for foreign investment is a key obligation that both parties adopt. NTIA states the U.S. has also actively supported the efforts of the OECD to create and expand vehicles to liberalize foreign direct investment. NTIA observes that in 1976 the OECD adopted a number of decisions regarding foreign direct investment, including the endorsement of the principle of national treatment for foreign-controlled firms once they have been established. NTIA states that the OECD's Code for the Liberalization of Capital Movements,[32] and the associated National Treatment Instrument described above, provide the right to establish and the responsibility not to adopt policies which have the intent of preventing or significantly impeding inward direct investment by non-residents. NTIA also notes that in April 1984, at the urging of the U.S., the OECD amended the Code to provide for the right of establishment. NTIA states that the U.S. regards Code Obligations as binding, and, this fall, the U.S. intends to work toward strengthening the National Treatment Instrument.

41. NTIA notes that there are exceptions to the national treatment principle, but asserts that these exceptions are maintained only in limited areas for national security and related interests. NTIA acknowledges that certain, narrowly defined, traditional exceptions are recognized in communications, but argues that only a compelling reason would justify the creation of further exceptions. NTIA also argues the application of new discriminatory reporting requirements to firms owned by nationals of certain foreign countries already investing in the United States might be contrary to U.S. obligations in several FCN treaties. NTIA states that upon careful review, it does not find any reason that would compel it to depart from the principle of national treatment. NTIA argues that the *Order* could be viewed as violating those agreements that, in turn, could establish precedent and pressure for retaliation in other countries. NTIA asserts that retaliation would not necessarily be limited to areas in which U.S. firms and their subsidiaries currently find market access barriers and that U.S. interests could be made worse off as a result of this action. NTIA states that any sign that the U.S. is reversing its longstanding policy of national treatment will also undercut U.S. negotiating credibility and ultimately disadvantage U.S. companies. NTIA concludes by suggesting that additional consultations with the executive branch could have removed misconceptions on this point.

b. Comments

42. MCI and Pan American Satellite (PAS) oppose NTIA's petition for reconsideration. MCI states that the Commission has broad authority to obtain information relevant to its regulatory functions and that the reporting requirements on foreign-owned carriers regarding traffic volumes and revenues are entirely reasonable when judged as part of the Commission's efforts to monitor the scope and participation of foreign interests in the domestic U.S. telecommunications service industry. MCI argues that the Commission has not altered the status of foreign-owned carriers in this proceeding and that the new reporting requirements are not in any way inconsistent with the dominant/non-dominant dichotomy established by the Commission in the *Competitive Carrier* proceeding as a mechanism for providing streamlined regulatory oversight of carriers unable to wield market power and engage in anticompetitive practices. MCI observes that foreign-owned carriers are still considered nondominant as to domestic service offerings in the U.S. and dominant as to their international services. MCI notes that classification as a nondominant carrier does not automatically deregulate a carrier. MCI argues that instead, such classification makes the carrier eligible for streamlined regulatory treatment if, and for so long as, this Commission chooses to abstain from full regulation. MCI observes that that streamlined treatment pertains only to reduced requirements of facilities certification and tariffing and does not encompass data reporting. MCI states that nondominant carriers are not exempt from Commission regulation, but that this Commission has chosen not to exercise the full scope of the regulatory oversight that we could employ over those carriers.

43. MCI states that the Commission has simply elected to impose additional reporting requirements in order to obtain information relevant to our regulatory efforts. MCI notes that the only change caused by this proceeding is the imposition of reporting requirements that are fully

consistent with the Commission's statutory mandate and rules. MCI argues that because foreign carriers continue to be afforded nondominant status from their domestic U.S. operations, it is not accurate to suggest that they are now being afforded less favorable treatment than other nondominant carriers. MCI notes that foreign-owned carriers continue to be provided with relief from full facilities certification and tariffing requirements for their domestic services. As a result, MCI believes that we should retain our reporting requirements for foreign-owned carriers.

44. PAS states that it takes no position concerning which governmental authority has jurisdiction over particular matters of trade policy and asserts that the resolution of such issues is unnecessary in this proceeding because the Commission's jurisdiction to take into account reciprocity concerns when foreign carriers seek access to the U.S. market by itself justifies imposition of the new reporting requirements. PAS asserts that the Commission adopted reporting requirements applicable to international services provided by foreign carriers in the *International Competitive Carrier* proceeding,[33] and that the Commission's jurisdiction in this area therefore has already been resolved. PAS argues that the *Order* merely extended those reporting requirements to foreign carrier's domestic service offerings and concludes that reciprocity concerns in both cases provide adequate reason for the adoption of the reporting requirements. PAS asserts that the Commission's ability to monitor the access of U.S. carriers to foreign markets is a useful and necessary tool and observes that it has filed pleadings implicating reciprocity issues in the context of applications filed by two foreign-owned carriers, Cable and Wireless Communications, Inc. (C&W) and FTC Communications, Inc. (FTCC). PAS adds that it withdrew its pleadings concerning C&W following favorable developments affecting PAS' access to the British market.

c. Reply Comments

45. The Delegation of the Commission of the European Communities (EC) states that it is concerned that the reporting and notification requirements placed on foreign-owned carriers offering services within the U.S. are more onerous than those applying to domestic U.S. carriers, implying discrimination against foreign-owned carriers in the U.S. market. The EC states that these reporting requirements do not seem to be in line with the OECD guidelines on national treatment of direct foreign investment.

2. Accounting Rates

a. Comments

46. American Telephone and Telegraph Co. (AT&T), FTC Communications, Inc. (FTCC), Kokusai Denshin Denwa Co., Ltd. (KDD), MCI, NTIA and US Sprint filed comments on international accounting rates. AT&T submits that significant conclusions cannot be drawn from the increase in settlement payments alone. AT&T states that a focus on accounting rates and the level of settlement outpayment ignores the fundamental principle that international communications are provided jointly, in cooperation with foreign carriers, not in competition. AT&T argues that the success of this process depends upon the participants working closely together to reduce collection rates, introduce innovative service offerings, stimulate traffic, efficiently complete calls, reduce costs and thereby increase the revenues that are available for sharing. AT&T states that all of the above-mentioned factors affect the cost and eventually the price of international services and that accounting rates are just one part of this multi-faceted relationship. AT&T argues that bilateral accounting rate negotiations must consider the balance of traffic in each direction, constantly changing currency valuations, network costs, collection rate levels, and promotional advertising and marketing activities in each country, and a continual reassessment of marketplace conditions is necessary to keep pace with the changing environment. AT&T asserts that the interrelationship of all of these factors must be understood and managed successfully if U.S. consumers are to continue receiving the benefits of lower rates and innovative service offerings.

47. AT&T maintains that for the foreseeable future, outbound traffic can be expected to exceed inbound traffic. AT&T attributes this imbalance to four factors: 1) generally lower U.S. collection rates; 2) the stimulating effects of growth in the U.S. economy; 3) the relatively high per capital income in the U.S., coupled with its large population; and 4) the central role the telephone plays in social and business dealings. AT&T claims that it is working successfully to reduce accounting rate levels, stating that since 1982 it has renegotiated over 230, new, lower accounting rates agreements that have reduced settlements payments on a cumulative basis by about $775 million. AT&T states that the evidence shows that in a relatively brief period U.S. carriers of all sizes have successfully entered the international switched voice market and that there is no evidence that foreign administrations have used the level of accounting rates to discriminate among U.S. carriers. AT&T also states that agreements to invest hundreds of millions of dollars to design and install fiber optic cables globally belie the notion that the level of accounting rates has dampened financial incentives for technological advances. AT&T adds that U.S. international long-distance (ILD) users have received the benefits of massive rate reductions[34] and innovative service offerings.[35] AT&T states that it supports the need for lower accounting rates not because existing levels are "above-cost," but because downward movement in the level of accounting rates is necessary to meet the demands of the market. AT&T claims that its negotiations with foreign correspondents have lowered AT&T's worldwide average settlement outpayment by over 10 percent to $.96 per minute. AT&T also observes that it has negotiated changes, such as the introduction of peak/off-peak accounting rates and growth-based accounting rates, that provide greater flexibility to stimulate ILD traffic demand.

48. AT&T asserts that the Commission has two roles to play concerning accounting rates. First, AT&T states that the Commission should continue to insure that U.S. carriers are not subject to whipsawing in accounting rate negotiations. Second, AT&T states that the Commission must also continue to approve accounting rates changes promptly that benefit U.S. industry – whether the changes involve lower accounting rate levels, peak/off-peak and growth-based accounting rate structures, and any other new, market-driven methodology. AT&T opposes, at this time, Commission involvement beyond these two roles as possibly bringing the accounting rate process to a standstill and slowing, rather than accelerating, needed changes in the marketplace. Specifically, AT&T argues that gov-

ernment-to-government discussions would pose a significant risk of changing the fundamental nature of international services from one of cooperation and collaboration into one of delay and confrontation. AT&T, states that the U.S. international carriers are in the best position to manage the accounting rate process and the other interrelated issues of the international services market. AT&T concludes that since U.S. ILD users receive the benefit of lower rates and innovative services, there is no need for additional regulatory action by the Commission.

49. FTCC states that, as a historical matter, the U.S. did not have any balance of payment problems for international message telephone service (IMTS) up to the mid-1970's despite the fact that AT&T's IMTS monopoly allowed AT&T to set collection rates at a commensurately high level. FTCC observes that the result was that each outbound minute earned enough revenue both to cover domestic costs and the outpayment of a comfortable margin to the PTT. FTCC states that AT&T used the high earnings that resulted from IMTS to subsidize its interstate rates. FTCC argues that there are great difficulties involved in the accounting rate, principally the lack of effective leverage, that make it necessary to evaluate a second alternative. FTCC observes that a combination of Commission pressure on AT&T and the introduction of competition in the IMTS market has resulted in a domestic decrease in U.S. international message telephone service (IMTS) collection rates and that, in many cases, the U.S. IMTS collection rate is no longer sufficient to cover all the costs of inbound traffic and to provide a reasonable rate of return, particularly for AT&T's competition. FTCC observes that PTTs generally have a policy of providing proportionate return traffic -- that is, the amount of inbound traffic each U.S. carrier receives is proportionate to its share of outbound traffic -- and that to receive a larger share of inbound traffic a carrier must increase its market share of outbound traffic, with the only realistic way to increase market share being a reduction in U.S. IMTS collection rates. FTCC argues that the result is an unremitting downward pressure on U.S. IMTS collection rates even, in its view, beyond the point of economic sense. FTCC contends that carriers become dependent on the revenues from inbound traffic because it costs little to handle and therefore carries a high profit margin and asserts that low U.S. IMTS collection rates may represent a significant barrier to entry for new carriers that do not have inbound traffic and may block the efforts of existing carriers to expand their service to new countries.

50. FTCC argues that the most immediate effect of this vicious cycle is seen in the net traffic flow. FTCC states that the dramatic decrease in collection rates over the last ten years, combined with the decreasing value of the dollar against many foreign currencies, makes it less expensive to place a call originating in the U.S. as compared to the same call in reverse direction and that any two parties with regular telephone communication will arrange to have calls initiated in the United States. FTCC asserts that the balance of payments situation is likely to worsen unless some action is taken to relieve the downward pressure on collection rates. FTCC urges the Commission to issue another Notice of Inquiry that would propose requiring that AT&T earn a reasonable rate of return on outbound traffic. FTCC believes that an increase in U.S. collection rates for IMTS would tend to rectify the imbalance between inbound and outbound traffic and that the excess earnings or inbound traffic above a reasonable rate of return could be credited to AT&T's interstate long-distance service, thereby reducing collection rates on domestic interstate telephone calls.

51. KDD states that it maintained exclusive responsibility for international telecommunications originating and terminating in Japan until the enactment of Japans Telecommunications Business Law of April 1985. KDD observes that pursuant to the new Business Law, two new international carriers, International Telecom Japan Inc. (ITJ) and International Digital Communications, Inc. (IDC) have been licensed to provide international telecommunications services in Japan in direct competition with KDD. KDD states that, as Japan's prominent international telecommunications carrier and its correspondent for international telephone service between Japan and the U.S., KDD has a close interest in, and possesses pertinent information concerning the issues raised in the *Supplemental Notice*. KDD adds that it wishes to contribute in a positive fashion to the Commission's record in this proceeding by presenting factual information regarding the interrelationship between KDD's national collection rates and international traffic volume and the state of international telephone accounting rates between the United States and Japan. KDD asserts that the humanization of international accounting rates for telecommunications services is most properly a carrier-to-carrier rather than an intergovernmental matter. KDD welcomes the opportunity, however, to enhance the Commission's understanding of the facts regarding the flow of and rates for telecommunications traffic between our nations and to add to the factual record in this proceeding.

52. KDD begins by noting that KDD has reduced its collection rates to the U.S. five times in the past nine years and that KDD's collection rate for a five minute call to the U.S. has decreased from y5,400 in November 1979 to y1,980 today, a reduction of more than 63 percent. KDD adds that the number of international calls from Japan increased by a multiple of more than 15 between 1975 and 1986, from 4.42 million outgoing calls in 1975 to 68.85 million outgoing calls in 1986. KDD observes that the number of international calls originating in Japan and terminating in Japan have grown by roughly equivalent levels throughout this period. KDD asserts that the remarkable rates in international traffic volume in Japan exceed the corresponding traffic growth rates of most western nations, including the United States. KDD argues that in light of the drastic reduction in KDD's international collection rates and the accompanying extraordinary increase in volumes and minutes of international calls from Japan, it is manifest that any common carrier with depression of traffic volumes caused by high collection rates in certain other countries is not applicable to Japan.

53. KDD states that Japan's international accounting rate for termination of telephone traffic originating in the U.S. has substantially decreased in real and absolute terms over the past several years. KDD observes that the international accounting rate for termination in Japan of telephone calls originating in the U.S. is set on the basis of the U.S. dollar, and that the dollar has fallen by approximately 50 percent relative to the yen in the past three years alone and by 60 percent since 1975. KDD states that in addition to the significant decline of U.S. accounting rate payments to KDD in real dollar terms, KDD's international telephone accounting rate has also decreased in

absolute dollar terms from $3.00 per minute in January 1982 to $2.35, a reduction of nearly 22 percent. KDD adds that it anticipates, pending government approval, that a further accounting rate reduction could be implemented as of July 1, 1988. KDD argues that in light of the foregoing there is no reasonable basis for U.S. government action with regard to Japan's international telephone accounting rates.[36]

54. MCI reiterates its view that the most critical component of an effective regulatory oversight mechanism is the timely availability of data regarding the scope and direction of foreign participation in both U.S. domestic and international common carrier activities. MCI believes that the Commission should require that foreign-owned carriers file annual reports that should include brief descriptions of all contractual agreements for international facilities and international services executed by the carrier during the preceding year, a list and brief description of all international services offered by the carrier, and a summary of the carrier's facilities additions.

55. MCI states that the current system of international accounting rate development has fostered significant progress toward the goal of reduced accounting rates and competition. MCI asserts that the Commission's current settlements policy establishes a workable, effective framework to encourage the development of reasonable accounting rates and fair settlement processes. MCI states that there is no reason to believe that such services will not continue in the future provided the Commission continues to enforce the provisions of the policy and contends that, as a result, there is no compelling reason for the Commission to alter its process for oversight of accounting rates and settlements arrangements.

56. NTIA notes that since our creation, this Commission has served as the U.S. clearinghouse for international accounting rate arguments and states that our proposed study of the interrelationship of international accounting rates and national collection rates may provide valuable information with respect to issues within the Commission's jurisdiction. NTIA states that the Commission has always had the lead role in the U.S. government in overseeing international settlement rates and it looks forward to the results of the Commission's study.

57. US Sprint supports our continuing efforts to extend the benefits of competition to the international telecommunications marketplace by encouraging foreign administrations to promote greater fairness and more liberal access to their markets. US Sprint adds that in the time period since its original comments were filed, there has been a marked improvement in U.S. carrier access to foreign markets. US Sprint also states that in recent years international facilities costs, and the costs of terminating traffic in foreign countries, have been dramatically reduced. US Sprint states that new, high capacity cable systems have been put into operation, INTELSAT rates have been lowered, satellite earth station costs have fallen, and circuit multiplication and other new technologies have greatly improved the cost efficiency of international transmission service. US Sprint observes that to some extent these lower costs have been reflected in lower international accounting rates, but that above-cost rates themselves are, for the most part, a relic of the monopoly environment when there was no competitive pressure to push rates toward costs. US Sprint asserts that in today's increasingly competitive environment, artificially high accounting rates are unjustified.

58. US Sprint states that while accounting rates increasingly appear to reflect service costs, the large traffic imbalance between the U.S. and foreign countries is a related and more difficult problem. Sprint observes that where there is a disproportionately high ratio of outbound to inbound traffic, high accounting rates discourage PTTs from stimulating higher traffic levels destined for the United States and that such traffic imbalances exacerbate the impact of artificially high accounting rates. US Sprint argues that this creates a barrier to new entry and an uneconomic cost of service that is ultimately picked up by the U.S. ratepayer. Sprint expresses concern that certain foreign countries appear to benefit disproportionately from the overall growth of U.S. outbound traffic. Therefore, while Sprint supports Commission efforts to lower accounting rates, it believes without greater equalization of inbound and outbound traffic the benefits of lower accounting rates will be diminished. US Sprint emphasizes, however, that the Commission must avoid over-rigidity and approach each market individually. US Sprint believes that continued Commission participation in bilateral and multilateral discussions and vigorous promotion of the benefits of the U.S. competitive domestic telecommunications market should be fundamental elements of the Commission's strategy to bring the benefits of competition to international telecommunications services and urges the Commission to continue to seek liberalization of foreign telecommunications markets through flexible and non-retaliatory regulating policies and open negotiations.

b. Reply Comments

59. AT&T, FTCC, and KDD filed reply comments. AT&T states that, with the exception of FTCC, the position of the other parties are in accord with AT&T's position on the accounting rate issue. AT&T asserts that FTCC's comments exceed the scope of the issues raised in this docket and that FTCC's proposal would lead to higher rates for U.S. consumers. AT&T argues that the best way to correct the great inbound/outbound traffic imbalance is for foreign carriers to take rate and other actions to increase calling to the U.S., and not, as FTCC suggests, to make calling from the U.S. unattractive to consumers. AT&T adds that the FTCC proposal would be virtually impossible to implement unless all U.S. carriers were subject to the same rules, including carriers not currently subject to rate of return regulation. AT&T argues, in addition, that the Commission lacks authority to set accounting rate levels or the level of collection rates charged by foreign carriers. AT&T concludes that the FTCC proposal would insulate carriers from marketplace forces that have driven U.S. collection rates lower and continue to result in reductions in foreign collection rates and, as a result, the FTCC proposal should be rejected in its entirety.

60. FTCC opposes MCI's suggestion that, in additional to the *Order*'s reporting requirements, the Commission require "foreign-owned" carriers, but not other carriers, to provide even more information concerning their operations - including all contracts for international services - which could force a carrier to make its customer list available to its competition. FTCC states that MCI fails to explain why this additional information is useful to the Commission, and supports NTIA's concern that additional reporting requirements would discriminate against foreign-owned entities. FTCC emphasizes that the MCI pro-

posal could interfere with foreign investments by upsetting the predictability and stability of the U.S. investment climate. FTCC suggests that the MCI proposal violates national treatment and therefore, the Commission should be careful in adopting even more discriminatory requirements, especially in the absence of any showing of their usefulness.

61. KDD states that the comments of most other parties to this proceeding confirm and underscore the factual information submitted by KDD in its comments. KDD argues that none of the commentors support the notion of increasing U.S. governmental involvement in international telephone accounting rate matters and restates its position that the harmonization of international accounting rates for telecommunications services should be negotiated through a carrier-to-carrier relationship rather than being treated as an intergovernmental matter.

C. Discussion

62. Our current regulations for the provision of common carrier services within the United States and for the provision of international common carriers service to or from the United States, which were adopted over the course of the last decade in our *Competitive Carrier* [37] and *International Competitive Carrier* [38] proceedings respectively, seek to address traditional regulatory concerns with regard to the exercise of market power by one or more carriers in U.S. telecommunications markets. In the *First Report and Order* in our *Competitive Carrier* proceeding, we established a distinction among carriers on the basis of their dominance, or power, in the marketplace. We concluded that we should consider a firm to be dominant if it has market power -- that is, the ability to control price --and stated that an important structural characteristic of the marketplace that confers market power upon a firm is the control of bottleneck facilities.[39] In this context, we specifically determined that AT&T and the independent telephone companies should be considered dominant in their provision of regulated common carrier services. We also determined that, due to what we stated might be considered transitory factors, Western Union, domestic satellite carriers (domsats), domsat resellers, and miscellaneous common carriers possessed market power sufficient to justify continuing the application of the current regulatory system, but that a continuing assessment would be warranted.[40] We concluded, however, that specialized common carriers (SCCs)[41] (also referred to at that time as terrestrial microwave carriers) and resale carriers[42] (excluding resellers of satellite transmission facilities) did not possess market power and would be considered nondominant. We streamlined our facilities authorization[43] and tariffing procedures[44] for these nondominant firms, but stated that we would continue to require semiannual reports of additional transmission facilities circuits and reserved the right to require that these carriers provide supplemental information if needed.[45]

63. In the *Second Report and Order* in the *Competitive Carrier* proceeding, we concluded that we should forbear from regulation of resale carriers and that these carriers should be free to provide service free from the entry and exit requirements of Section 214 and the tariff filing requirements[46] of Section 203.[47] In the *Third Report and Order* in the *Competitive Carrier* proceeding, we extended the geographic scope of these reductions in regulatory requirements to include Hawaii, Puerto Rico, U.S. Virgin Islands and other offshore U.S. points.[48] In the *Fourth Report and Order* in the *Competitive Carrier* proceeding, we determined that miscellaneous common carriers, domsats, domsat resellers, interexchange carriers affiliated with exchange telephone companies, as well as the domestic operations of Western Union and the other record carriers should be classified as nondominant.[49] In the *Fifth Report and Order* in the *Competitive Carrier* proceeding, we reaffirmed our decision that Western Union should be considered nondominant for the provision of domestic, interstate, interexchange services and extended forbearance from regulation to the provision of interstate services by domestic satellite carriers, affiliates of exchange carriers, miscellaneous common carriers, and carrier providing high speed, two-way, digital transmission networks.[50] In the *Sixth Report and Order*, which was overturned by the D.C. Circuit Court of Appeals, we concluded that we should order the cancellation of forborne carrier tariffs.[51]

64. In the our *International Competitive Carrier* proceeding, we concluded that we should apply the dominant/nondominant classification scheme to the provision of international telecommunications services to and from the United States. We emphasized that our determination whether to reduce regulation of a common carrier would be based on whether that carrier has market power and listed factors we would consider in any determination of market power, such as market share, control of bottleneck facilities, rate of return, and actual or potential competition.[52] We noted, for example, that unlike the domestic market, where it is relatively easy for carriers to respond to customer demand by redeploying existing facilities since there are no substantial technological, economic or legal barriers blocking the reallocation of carrier resources, a number of unique features of the international market make it difficult for carriers to reallocate resources.[53] Moreover, we addressed, for the first time, whether carriers owned by foreign telecommunications entities[54] have market power. Furthermore, we made it clear at that time that we continue to have concerns about reciprocity -- that is, market entry -- as well as market distortions --that is, unequal interconnection or other forms of discrimination -- and concluded that carriers owned by foreign telecommunications entities should be considered dominant for the provision of all services to all foreign points. As a result, we stated that we would impose certain filing requirements on foreign telecommunications entities[55] and that we would consider, on an ad hoc basis, whether to condition specific Section 214 certifications to carriers owned by foreign telecommunications entities on the granting of operating agreements to U.S. carriers.

65. In the *Order* in this proceeding, we concluded that we should extend the reporting requirements established for carriers owned by foreign telecommunications entities in our *International Competitive Carrier* proceeding to the provision of common carrier services solely within the United States. NTIA did not file comments and did not oppose the reporting requirements we adopted in the *International Competitive Carrier* proceeding. NTIA also did not take issue with our analysis of the market power of carriers owned by foreign telecommunications entities. Indeed, to the contrary, in this proceeding NTIA implicitly adopts our market power analysis when it asserts that we should use the dominant/nondominant regulatory classification for the provision of domestic, interstate, long-distance services in establishing the proper regulatory treatment of carriers owned by foreign telecommunica-

tions entities in the U.S. market. NTIA also implicitly recognizes that establishing the appropriate regulatory classification of carriers owned by foreign telecommunications entities in the U.S. domestic, interstate, long-distance services marketplace is a matter of first impression.

66. As a result, in this *Order on Reconsideration*, we reaffirm our decision to establish reporting requirements on the provision of domestic, interstate, long-distance services by carriers owned by foreign telecommunications entities. We believe that these reports will permit us to make a more informed judgment whether we should consider proposing, in the context of our ongoing review of our competitive carrier policies, that carriers owned by foreign telecommunications entities be considered dominant in the provision of domestic, interstate, long-distance services. We also believe that these these reports may permit us to make a more informed judgment concerning what, if any, additional action we should consider proposing, in the context of our ongoing review of our international settlements policy, to lower accounting rates for international telecommunications services originating or terminating in the United States.

67. We continue to believe that the monitoring approach established in this proceeding is consistent with the concept of national treatment as defined in the bilateral and multilateral international legal instruments and other documents cited in NTIA's petition, and with any legal obligations contained therein. While we recognize that we have not yet addressed the classification of carriers owned by foreign telecommunications entities in the U.S. domestic, interstate, long-distance services marketplace, we believe that the result is that we have afforded "treatment no less favorable than the treatment accorded therein in like situations to nationals . . . of such Party" as defined in Article VII, paragraph 1 of the standard draft standard friendship, commerce and navigation (FCN) treaty,[56] or treatment "no less favorable than the treatment accorded in like situations to domestic enterprises . . . ." as defined in the National Treatment Instrument of the Organization for Economic Cooperation and Development (OECD).[57] Simply put, while we have made a specific determination that a wide variety of U.S. carriers are nondominant for the provision of domestic, interstate, long-distance services, we have not addressed, as a policy matter, whether carriers owned by foreign telecommunications have market power in the U.S. domestic, interstate, long-distance services marketplace. Therefore, there are no domestic firms in a "like situation" and there is no conflict with the national treatment principle.[58]

68. Indeed, we believe that such an approach, by avoiding a direct comparison at this time to either dominant carriers or nondominant carriers, results in treatment more favorable for carriers owned by foreign owned telecommunications entities than an approach that would prejudge the outcome of our examination of the potential market power of carriers owned by foreign telecommunications entities in the U.S. domestic, interstate, long-distance services market.[59] Moreover, we believe that this analysis is more consistent with prevailing international practice.[60] In particular, we note that the National Treatment Committee of the OECD has stated that in cases where an enterprise under foreign control receives treatment at least as favorable as the least well treated domestic enterprise, the Committee considers it "neither possible nor desirable" to provide an answer of principle to the question of whether this could constitute an exception to national treatment.[61] In addition, the Committee has stated that the consistency of such measures with national treatment should be considered pragmatically on a case-by-case basis that, in particular, takes into account individual national characteristics and the degree to which the foreign-controlled enterprise and the domestic enterprise concerned are placed in the same circumstances.[62]

69. We recognize, of course, that the purpose of the national treatment principle is to establish a favorable climate for foreign investment and to encourage foreign-controlled enterprises to contribute to economic and social progress.[63] We do not believe that the reporting requirements that we established in the *Order* can be compared, however, to the investment restrictions that the national treatment principle is designed to address, nor do we believe that our reporting requirements will have any negative affect on the investment climate for foreign investment in the U.S. telecommunications market. To the contrary, while we have clear authority under Section 214 of the Act to address investment in common carrier facilities,[64] we have declined to require the filing of an application by carriers owned by foreign telecommunications entities to obtain authority on an individual basis to construct, extend, acquire or operate domestic, interstate, common carrier facilities. Rather, we have made a clear distinction between facilities authorization and tariffing requirements on the one hand and information reporting requirements on the other. As a result, we believe strongly that it would be incorrect to view such reports as the equivalent of, or a substitute for, our regulatory oversight over common carrier investment in the context of the facilities authorization process or the tariffing process.[65]

70. In any event, we find it difficult to reconcile the NTIA statement that U.S. policy is to afford national treatment to foreign investors in telecommunications with certain provisions set forth in the Communications Act.[66] We note with particular concern that while NTIA states that "[a]ny Commission action must comply with the international obligations of the United States with respect to national treatment" [67] and that the "United States regards Code obligations as binding,"[68] NTIA does not provide specific examples of a national treatment obligation for the provision of common carrier services within the United States. We also note that the standard FCN treaty cited by NTIA provides that "notwithstanding the national treatment obligations of Article VII (1), each Party reserves the right to limit the extent [of foreign investment] in communications."[69] Moreover, we note not only that applicable FCN treaties generally contain language that closely tracks the standard draft FCN treaty,[70] but that other applicable treaties generally contain language that either directly or indirectly exempt communications from a national treatment obligation. Article V(2) of the U.S.-French FCN treaty, for example, provides that:

> [e]ach High Contracting Party reserves the right to determine the extent to which aliens may, within its territories, create, control, manage, or acquire interests in, enterprises in communications . . . .[71]

Similarly, the U.S.-Canada Free Trade Agreement, which is the most recent statement of U.S. policy in this area, excludes the provision of common carrier services from a national treatment obligation.[72] An older, more tradition-

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al, example is the Commerce and Navigation Treaty between the United States and the United Kingdom which provides in Article 1 that "[t]here shall be between the Territories of the United States of America and all the Territories of His Britannick Majesty in Europe a reciprocal liberty of Commerce."[73]

71. Similarly, the National Treatment Instrument of the OECD provides that Members should provide national treatment consistent with their "needs to maintain public order."[74] and subject to the requirement that measures taken by a Member constituting a new exception to National Treatment (including measures restricting new investment by Foreign-Controlled Enterprises already established in their territory), taken after June 21, 1976, shall be notified by the Organization within 30 days of their introduction.[75] In addition, the OECD's Code for the liberalization of Capital Movements (Capital Movements Code), which addresses the inward direct investment by non-residents, provides that the provisions of the Code shall not prevent a Member from taking action that "it considers necessary for: (1) the maintenance of public order . . . ."[76] More important, however, we believe that it would be inappropriate to afford a higher status to these Codes[77] than that afforded the recommendations of the International Telecommunication Union, the preeminent organization in international telecommunications.[78]

72. Nevertheless, while we continue to believe that the reporting requirements we established in the *Order* for the provision of domestic, interstate, long-distance services by carriers owned by foreign telecommunications entities would be consistent with the national treatment principle, in order to be responsive to NTIA's concerns, we adopt the following modifications to the reporting requirements we established in the *Order*. First, we conclude that we should not establish a separate notification requirement for carriers owned by foreign telecommunications entities. Instead, we conclude that we need only to remind these carriers, as well as other carriers, of the statutory obligation set forth in Section 413 of the Communications Act to designate in writing an agent within the District of Columbia upon whom service of notices, processes, and orders may be made.[79] We also remind carriers that the Section 413 designation statement must be filed within sixty days after the commencement of service within the United States and that Title V of the Act provides us with the authority to impose appropriate measures for noncompliance.[80]

73. Second, we conclude that rather than requiring all "foreign-owned" carriers providing domestic telecommunications services to file quarterly traffic and revenue reports, we will require only those carriers that are owned by foreign telecommunications entities that are considered dominant for the provision of international telecommunications services originating or terminating in the United States to provide annual information on their provision of domestic, interstate, long-distance services. This time, Cable and Wireless Communications, Inc. (C&W), Consortium Communications International, Inc. (CCI), and FTC Communications, Inc. (FTCC), are the only carriers subject to the rules established in this proceeding. We also conclude that we should impose a "sunset" provision and that this requirement therefore will expire after three years absent a specific determination that an extension of this requirement is appropriate. Specifically, we conclude that these carriers must provide information on: (1) switched services (telephone, telex, and telegraph) (by messages, minutes and revenues); (2) private line services (by number of leases and revenues); and (3) any other common carrier services (identify).

74. We are confident that these modified reporting requirements are consistent with the principle of national treatment and any national treatment obligations of the United States.[81] Moreover, we note that since the supplementary annual reporting requirements for carriers owned by foreign telecommunications entities discussed above apply to nine or fewer persons they are not subject to OMB review under the Paperwork Reduction Act.[82]

75. We believe that these reporting requirements will permit us to monitor whether carriers owned by foreign telecommunications entities are using market power to influence the price of U.S. international telecommunications services[83] or the development of competition in U.S. and international telecommunications services markets.[84] In this context, we welcome the executive branch's recognition that this Commission has a preeminent role in establishing U.S. policy concerning international accounting rates. Moreover, as NTIA observes, our continuing oversight of international accounting rates may provide valuable additional information with respect to issues clearly within this Commission's jurisdiction. Therefore, while we conclude that we should not propose further action concerning the provision of common carrier services within the United States by carriers owned by foreign telecommunications entities or the issue of international accounting rates in this proceeding, we reserve the right to consider additional regulatory action as necessary in the context of our continuing review of our international competitive carrier and settlements policies. We also conclude, however, that our examination of any trade issues that might be associated with the provision of common carrier services, such as the application of the national treatment principle, is completed.

IV. PAPERWORK REDUCTION ANALYSIS

76. We have analyzed the reporting requirements contained in this *Order on Reconsideration* with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-20. We have furthered modified our original proposals in order to eliminate the annual procurement reporting requirements and to limit the application of the common carrier services reporting requirements to three carriers; Cable and Wireless Communications (C&W), Inc., Consortium Communications International, Inc. (CCI), and FTC Communications, Inc. (FTCC). Therefore, as discussed above, we do not need to coordinate with the Office of Management and Budget prior to the effective date of the common carrier service reporting requirements.

V. REGULATORY FLEXIBILITY ANALYSIS

77. Pursuant to 5 U.S.C. § 601 *et seq.*, an initial Regulatory Flexibility Analysis was incorporated in the *Notice*. Written comments on the proposals in the *Notice*'s flexibility analysis were requested. Parties did not file separate comments on this analysis. We do not believe, however, that these rule changes will cause significant economic impact on small entities. The reporting requirements for carriers owned by foreign telecommunications entities that are considered dominant for the provision of interna-

tional telecommunications services are an extension of an existing reporting requirement for the provision of international services. Moreover, these reporting requirements apply to only three firms. Furthermore, we have provided for a "sunset" provision. A copy of this *Order on Reconsideration*, however, will be forwarded to the Chief Counsel for Advocacy of the Small Business Administration.

VI. ORDERING CLAUSES

78. Accordingly, IT IS ORDERED, that pursuant to 47 U.S.C. Sections 151, 154(i)-(j), 201-205, 211, 213-215, 218-220, 403, and 413, that Part 43 and Part 63 of our Rules are amended by adding the following:

(1) That FTCC, C&W, and CCI shall file information as provided for in Appendix A; and

(2) That all carriers that are providing common carrier services within the United States are reminded of their obligation to file a Section 413 designation statement.

79. IT IS FURTHER ORDERED, that the Chief, Common Carrier Bureau is delegated authority to determine that additional carriers, not to exceed nine carriers in total, that are owned by foreign telecommunications entities that are classified as dominant for the provision of international telecommunications services originating or terminating in the United States must file Section 43.81 reports.

80. IT IS FURTHER ORDERED That the NTIA, Siemens, and BellSouth petitions for reconsideration and the GTE petition for clarification ARE GRANTED to the extent discussed herein and ARE OTHERWISE DENIED.

81. IT IS FURTHER ORDERED That this order is effective on its release and that, in the absence of further petitions for reconsideration to this order, this docket is CONCLUDED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

RULE CHANGES

47 C.F.R. PARTS 43 AND 63 ARE AMENDED AS FOLLOWS;

I. The Authority Citation for Part 43 continues to read as follows:

AUTHORITY: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. Section 154 unless otherwise noted. Interpret or apply Sections 211, 219, 48 Stat. 1073, 1077, as amended; 47 U.S.C. Sections 211, 219, 220, unless otherwise noted.

II. Section 43.81 is revised in its entirety to read as follows:

Section 43.81 — Reports of Carriers Owned by Foreign Telecommunications Entities

(A) the following carriers are required to file with the Commission an annual revenue and traffic report in triplicate with respect to all common carrier telecommunications services they offer within the United States: (1) Cable and Wireless Communications, Inc; (2) FTCC Communications Inc.; and (3) Consortium Communications International, Inc.;

(B) the Chief, Common Carrier Bureau has the authority to require that no more than six additional communications carriers owned by foreign telecommunications entities that are classified as dominant for the provision of international telecommunications services originating or terminating in the United States file Section 43.81 reports;

(C) the report should be captioned -- Section 43.81 report and should provide the following:

(1) Revenues, number of messages and number of minutes for message telephone service traffic (a) originated and/or (b) terminated by the filing carrier;

(2) Revenues, number of messages, and number of minutes for telex traffic (a) originated and/or (b) terminated by the filing carrier;

(3) Revenues, number of messages, and number of minutes for telegraph traffic (a) originated and/or (b) terminated by the filing carrier;

(4) Revenues, number of messages, and number of minutes for any other basic switched services (specified by service) (a) originated and/or (b) terminated by the filing carrier; and

(5) Number of leases and revenues from private line services provided by the filing carrier.

(D) Section 43.81 Reports for: (1) the calendar year 1988 must be filed on or before August 1, 1989; (2) the calendar year 1989 must be filed on or before August 1, 1990; and (3) the calendar year 1990 must be filed on or before August 1, 1991; and

(E) these reports shall apply to nine or fewer persons and therefore are not subject to the review of the Office of Management and Budget under the Paperwork Reduction Act.

III. Section 63.801 as set forth in the Report and Order in CC Docket No. 86-494 is removed.

FOOTNOTES

[1] Regulatory Policies and International Telecommunications, Notice of Inquiry and Proposed Rule Making, CC Docket No. 86-494, 2 FCC Rcd 1022 (released January 30, 1987) (hereinafter *Notice*).

[2] *See, e.g.*, U.S. Industrial Outlook 1986.

[3] We invited comment on two alternative information - gathering approaches: (1) the reinstitution of a Section 214 certification requirement for foreign-owned carriers providing long-distance services within the U.S.; or (2) a requirement that foreign-owned carriers file revenue and traffic reports on their long-distance operations within the U.S. on a quarterly basis.

[4] Regulatory Policies and International Telecommunications, Report and Order and Supplemental Notice of Inquiry, CC Docket 86-494, FCC 88-71 (released March 25, 1988) (hereinafter *Order* and *Supplemental Notice*).

[5] 44 U.S.C. §§ 3501-20.

[6] *See* letter from Franklin S. Reeder, Chief, Information Policy Branch, Office of Information and Regulatory Affairs, OMB, to Edward J. Minkel, Managing Director, FCC (March 19, 1987).

[7] *See* Letter from James B. MacRae, Jr., Acting Administrator and Deputy Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, to Edward J. Minkel, Managing Director, FCC (May 20, 1988).

[8] In response to the OMB request, we extended the July 1, 1988 filing deadlines for these reporting requirements until further notice. *See Order*, CC Docket 86-494, DA 88-895 (released June 15, 1988).

[9] 5 C.F.R. § 1320.6(j).

[10] On August 3, 1988, Ericsson North America, Inc. (Ericsson) filed "informal" comments on the OMB letter. Ericsson asserts that the lack of specificity in the *Order* concerning the actual data elements of the reporting requirements makes it difficult to assess whether the reports will provide us with a balanced profile of foreign participation in the core equipment market. Ericsson agrees with OMB that we should adopt a questionnaire for the collection of Section 63.801 information. Ericsson believes that prior to the submission of the questionnaire to OMB we should issue a public notice requesting comments. Ericsson also argues that we should develop specific guidelines and definitions on "country of origin" and other similar issues. Finally, Ericsson argues that manufacturers, like carriers, may have legitimate competitive and commercial reasons for the confidential treatment of information regarding their core equipment sales to carriers and that we should either automatically confer confidential status on all annual procurement reports or allow manufacturers of core equipment to request such treatment.

[11] The *Order* noted that we have defined Tier 1 companies as those companies having more than $100 million in total company revenues from regulated operations, as determined by the 1984 Annual Statistical Volume II of the USTA Statistical Reports of Class A & B Telephone Companies for 1983. *See* Commission Requirements for Cost Support Material to be filed with Access Tariffs, Public Notice, Mimeo No. 2133 (released January 25, 1985).

[12] The NTIA petition was coordinated with the International Trade Administration (ITA), Office of the U.S. Trade Representative (USTR), OMB, Council of Economic Advisors, and the Departments of State, Treasury, Defense, and Labor.

[13] GTE argues that providing a further breakdown between network switching and transmission data would be very burdensome and not provide the Commission with necessary information.

[14] GTE states that this would include an affiliated manufacturer, but not an affiliate that merely functions as a supplier.

[15] "Omnibus Trade and Competitiveness Act of 1988," H.R. 4848, 100th Cong., 2d Sess., 134 Cong. Rec. 5547, 5580 (1988) [hereinafter Telecommunications Trade Act].

[16] *See, e.g.*, Section 1375 (d)(3) and (11).

[17] Section 1380 provides only that "the Federal Communications Commission shall periodically submit to the appropriate committees of the House of Representatives and of the Senate any data collected and otherwise made public under Report No. DC-1105, 'Information Reporting Requirements Established for Common Carriers', adopted February 25, 1988 relating to FCC Docket No. 86-494, adopted December 23, 1987 . . . ." Similarly, Section 1381 of the Telecommunications Trade Act of 1988 provides, in part, that the Secretary of Commerce, in consultation with the Federal Communications Commission and the United States Trade Representative, shall conduct a study of the competitiveness of the United States telecommunications industry and the effect of foreign telecommunications policies and practices on such industry in order to assist the Congress and the President in determining what actions might be necessary to preserve the competitiveness of the United States telecommunications industry. We agree with CBEMA, however, that we already have sufficient information to fulfill this responsibility.

[18] The Department of Commerce produces the U.S. Industrial Outlook to meet the needs of the U.S. government, the business community and the public for economic data and analysis of specific industries. The 1988 U.S. Industrial Outlook has an entire section devoted to telephone and telegraph equipment that provides information on the U.S. telephone and telegraph equipment industry. *See* "1988 U.S. Industrial Outlook," International Trade Administration, U.S. Department of Commerce (January 1988).

[19] Section 4(i) of the Act, for example, empowers the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." *See* 47 U.S.C. § 4. Similarly, Sections 211, 213, 214, 215, 218, 219, and 220 provide us with authority to require the filing of a wide variety of information concerning the provision of common carrier services, including information concerning carrier procurement of core equipment.

[20] We observed in the *Order*, for example, that the net revenue outflow from the United States to the Federal Republic of Germany (FRG) increased from $10.1 million in 1975 to $87.6 million in 1986. Indeed, the combined net revenue outflow to the FRG from 1975 to 1986 was $628,639,984. *See Order* at n. 85.

[21] The *Order* also noted that the net settlement outflow for IMTS service from the U.S. to Japan increased from $2.9 million in 1975 to $62.4 million in 1986. *Id.*

[22] *See* "Competition - The Key to the Telecommunications Market in the Federal Republic of Germany," Address by Dr. Christian Schwarz-Schilling, Federal Minister of Posts and Telecommunications, Washington, D.C. (June 3, 1988).

[23] *See* August 3, 1988, Letter from Minoru Shioya, Director General, Telecommunications Bureau, Japanese Ministry of Posts and Telecommunications to Gerald Brock, Chief, Common Carrier Bureau.

[24] We note in particular that Section 1320.4(b) of OMB's rules requires that an agency show that it has taken every reasonable step to meet the following: (1) the agency must impose the least burdensome procedures for the fulfillment of the agency's functions; (2) the reports do not duplicate information already accessible to the agency; and (3) the reports serve some practical use. Moreover, Section 1320.6 states that "unless an agency is able to demonstrate that such collection of information is necessary to satisfy statutory requirements or other substantial need, OMB will not approve a collection of information." *See* 5 C.F.R. § 1320.6.

[25] In the *Order* we stated that we would use the definition of foreign ownership established in our *International Competitive Carrier* proceeding and made it clear that foreign telecommunications entities include telecommunications and telecommunications-related equipment manufacturers, equipment suppliers, and service providers. *See* International Competitive Carrier Policies, Report and Order, 59 R.R. 2d 303, 303-04, 102 FCC 2d 812 (1985), *Order on Reconsideration*, 60 R.R. 2d 1435, 1441-42 (1986); *recon. denied* FCC 86-339 (1986).

[26] We noted that the Commission has addressed this concern, in part, by treating foreign-owned firms as dominant for the provision of international telecommunications service and by streamlining, rather than forbearing from, regulation of international services provided by other common carriers (OCCs). As a result, foreign-owned carriers are dominant for all international voice and record carrier services to all countries. Carriers are considered foreign-owned if 15 percent of their stock is owned, directly or indirectly, by a foreign telecommunications entity. Carriers are also considered foreign-owned when an employee, agent or representative of a foreign telecommunications entity sits on its board of directors. *See* International Competitive Carrier Policies, Report and Order, 102 FCC 2d at n. 74 (1985).

[27] *See* Implementation and Scope of International Settlements Policy for Parallel International Telecommuniations Routes, Report & Order, CC Docket No. 85-204, FCC 86-30, 51 Fed. Reg. 4736 (released February 7, 1986); Order on Reconsideration 2 FCC Rec'd 1118 (1987); Further Reconsideration, 3 FCC Rec'd 1614 (1988).

[28] *See, e.g.* Trends in the International Communications Industry 1975-86, Industry Analysis Division, FCC (December, 1987). *See also Order* at para. 81 and notes 82-85.

[29] *Order* at para. 82.

[30] We also directed the Chief, Common Carrier Bureau to initiate a study of this issue and to report to this Commission in a timely fashion with a recommendation concerning what, if any, action the Commission should consider proposing to lower international accounting rates and telecommunications services originating and terminating in the United States. This report was submitted to the Commission December 12, 1988. *See* "International Accounting Rates and the Balance of Payments Deficit in Telecommunications Services," Report of the Common Carrier Bureau to the FCC (December 12, 1988). *See also* "Balance of Payments Deficit in International Telecommunications Services," Kenneth B. Stanley, Industry Analysis Division, Common Carrier Bureau (December 12, 1988).

[31] NTIA citing Art. VII of the Treaty of Friendship, Commerce and Navigation (standard draft, 1962).

[32] *See generally* Code of Liberalization of Capital Movements (OECD), (Oct. 19, 1986) at 28.

[33] *See* International Competitive Carrier Policies, *supra* note 25.

[34] AT&T states that ILD prices have been reduced by nearly 50 percent since 1975.

[35] AT&T lists services such as ReachOut, International Plus and USA Direct.

[36] *See supra* note 23 and accompanying text.

[37] *See* Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services, CC Docket No., 79-252, Notice of Inquiry and Proposed Rule Making, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Second Report and Order, 91 FCC 2d 59 (1982), Reconsideration, FCC 83-69, (released March 21, 1983); Third Report and Order, Mimeo No. 012 (released October 6, 1983); Fourth Report and Order, 95 FCC 2d 554 (1983); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), *rev'd, MCI v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

[38] *See* International Competitive Carrier Policies, *supra* note 25.

[39] We concluded that control of bottleneck facilities is present when a firm or group of firms has sufficient command over some essential commodity or facility in its industry to be able to impede new entrants. *See First Report and Order*, 85 FCC 2d 1, 20-22 (1980).

[40] *Id.* at 10-11.

[41] We stated that we considered the following carriers to be SCCs for the purposes of the *Competitive Carrier* proceeding: MCI, Southern Pacific, United States Transmission Systems, Goeken Communications, and Western Telecommunications. *Id.*

[42] We noted that there were the following eighteen resale carriers (not including satellite resellers): ITT Corporate Communications, ITT Domestic Transmission Systems, Graphnet, Telenet, Tymnet, RCA Global, DHL, DAG, Hyatt Corporation, Lease Data Services, National Communications Corp., Pacific Network Communications, TransNational Network, United Network Service, United States Telephone Communications, Telshare, Teltec Saving Communications, and Vector Communications. *Id.* at 28-30.

[43] We stated, for example, that all nondominant carriers applying for Section 214 certification authority would routinely receive authority to serve the continental U.S., unless they specify otherwise. *Id.* at 44-46. Section 214 provides that:

> No carrier shall undertake the construction of a new line or an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until, there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessary require or will require the construction, or operation, or construction and operation, of such additional or extended line . . . .

See 47 U.S.C. § 214.

[44] We concluded, for example, that nondominant carriers would no longer be required to submit certain cost support data in their tariff filings. *First Report and Order*, 85 FCC 2d at 30-35.

[45] *Id.* at 47-48.

[46] We stated that should a resale carrier seek to become a facilities based carrier, it would be subject to the streamlined rules applicable to nondominant carriers in the *First Report and Order*. We declined to forbear from imposing the facilities authorization and tariff requirements, however, on any entity established by dominant carriers to resell basic services. *See Second Report and Order* 91 FCC 2d 59, 73 (1982).

[47] Section 203 provides that:

> Every common carrier, except connecting carriers, shall within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between different points on its own system, and between points on its own system and points on the system of its connecting carrier . . . .

See 47 U.S.C. § 203.

[48] The geographic scope of the reduced regulation provided for in the *First Report and Order* and the *Second Report and Order* was expanded to include Alaska on reconsideration. *See Third Report and Order*, 48 Fed. Reg. 46,791 (October 15, 1983).

[49] We also concluded that we should forbear from regulation of all resellers, including domsat resellers and resellers affiliated with exchange telephone companies, and specialized common carriers. Furthermore, we concluded that nondominant carriers not subject to forbearance would be subject to streamlined regulation. We made it clear, however, that we could continue to investigate complaints against nondominant carriers and, if necessary, we could reimpose facilities authorization and tariffing requirements on nondominant carriers. In addition, we maintained the requirement that all carriers subject to forbearance file semiannual circuit reports. *See Fourth Report and Order*, 95 FCC 2d 554 (1983).

[50] We again maintained our requirement, however, that carriers subject to forbearance submit semiannual reports on initial circuits and circuits added. *See Fifth Report and Order*, 98 FCC 2d 1191, 1203 (1984).

[51] *See Sixth Report and Order*, 99 FCC 2d 1020 (1985), *rev'd* MCI v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[52] We affirmed our tentative conclusion that carriers providing international telecommunications services and facilities that do not have market power should be subject to streamlined regulation. In reaching this decision, we affirmed our conclusion that AT&T, and certain noncontiguous services providers should be considered dominant in the IMTS market. We also affirmed our tentative conclusion that Comsat should be considered dominant for the provision of space segment and multipurpose earth stations. We also concluded that Comsat should be considered dominant in the provision of television services and nondominant in the provision of IBS and end-to-end services. Moreover, we affirmed our tentative conclusion that, with the exception of carriers owned by foreign telecommunications entities, no carrier would be considered dominant in the non-IMTS market. We made it clear, however, that nondominant carriers would be required to file semiannual circuit reports. International Competitive Carrier Policies, *supra* note 25 at 844.

[53] We also noted that perhaps the most significant entry barrier in international telecommunications is the need to obtain an operating agreement before providing a particular service to a particular country. *Id.* at 826-7.

[54] We stated that foreign telecommunications entities include telecommunications and telecommunications-related equipment manufacturers, equipment suppliers, and service providers. *See Order supra* note 4 at para. 74.

[55] Specifically, we concluded that Section 214 certifications granted to carriers owned by foreign telecommunications entities should be subject to a general condition that these carriers submit country-by-country revenue and traffic reports for all the countries to which they provide service. We stated that these carriers must file data on all U.S. outbound traffic carried, indicating all terminating points, as well as data on all U.S. inbound traffic, indicating all originating points. *See* International Competitive Carrier Policies, *supra* note 25 at 844.

[56] *See* Charles H. Sullivan, Treaties of Friendship, Commerce, and Navigation, Study for the United States Department of State, 42, (Washington, D.C.) (1980). [hereinafter Sullivan Study].

[57] *See* OECD, International Investment and Multinational Enterprises: National Treatment for Foreign-Controlled Enterprises, Annex II (Paris 1985). [Hereinafter OECD Primer on National Treatment.] Similarly, we have afforded carriers owned by foreign telecommunications entities national treatment as defined by President Reagan's September 1983 International Investment Policy Statement, which states that the national treatment principle provides that "foreign investors should be treated no less favorably than domestic investors in like situations . . . ." *See* "International Investment Policy Statement," Statement by the President, Office of the Press Secretary, The White House (September 9, 1983).

[58] We note that NTIA itself provides a discussion of two alternative, and not entirely consistent, descriptions of national treatment. At one point, NTIA states that national treatment means that "foreign companies are treated no less favorably than the 'most' favored in the domestic market." NTIA Petition at 7. At another point, NTIA states that "foreign-owned carriers are not being afforded the same treatment as similar U.S.-owned companies." NTIA Petition at 8.

[59] We note that in the only instance in which we have considered a similar question we have determined that these carriers should be subject to the same regulatory treatment as other dominant carriers. *See* discussion of *International Competitive Carrier supra* notes 37-55 and accompanying text.

[60] It is also well established U.S. law that when an international legal instrument and U.S. law relate to the same subject, the courts will endeavor to construe them so as to give effect to both, if that can be done without violating the language of either. *See e.g.* 74 Am. Jur. 2d § 16.

[61] *See* OECD Primer *supra* note 52 at 17.

[62] In this context, we note that in contrast to the open entry environment for the provision of domestic and international long-distance services that this Commission has provided for in the United States, in most other countries, the government has reserved for itself, a regulated telecommunications entity, or a limited number of regulated telecommunications entities, the exclusive right to provide domestic and international long-distance services.

[63] *See, e.g.*, Convention of the Organisation for Economic Cooperation and Development, Article I (Paris, 1960).

[64] *See supra* note 43.

[65] Indeed, in the *Order* we noted that Cable and Wireless (C&W), one carrier that will be required to file these reports, has argued that it finds this approach -- that is, the establishment of a monitoring procedure -- to be preferable to the reinstitution of a Section 214 certification requirement for the provision of common carrier services within the United States by foreign-owned carriers. More recently, a second carrier that would be affected by this approach, FTCC, has stated these data collection requirements are a "minor inconvenience" in comparison to what FTCC describes as the "discriminatory treatment" that results from its regulatory classification as a dominant carrier. *See* FTCC Motion to Accept and Consider Additional Matter, FTCC Petition for Waiver of Dominant Status, I-S-P-88-005 (June 14, 1988) at p.4. FTCC is considered dominant under our rules since France Cables et Radio (FCR) elects one of FTCC's five directors. FCR also owns 14.9% of FTCC. In December 1987, the Chief, Common Carrier Bureau denied FTCC's request for a waiver of our *International Competitive Carrier* policies seeking the streamlined facilities authorization and tariffing regulation that is available to nondominant carriers. *See* Memorandum Opinion and Order, FTC Communications Inc., I-S-P-87-005 (released December 23, 1987).

[66] Section 310 of the Act, for example, forbids us from issuing a radio license to a foreign government and restricts the issuance of radio licenses for common carrier and certain other

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services. *See* 47 U.S.C. § 310. In addition, the Submarine Cable Landing License Act provides that conditions may be attached to a landing license as deemed necessary to serve the rights of U.S. citizens to land cables in foreign countries or to assure just and reasonable rates or the operation of such cable. Furthermore, Section 308(c) of the Communications Act, provides this Commission with the authority to condition any radio license for "commercial communications" between the U.S. and a foreign country for any of the purposes specified for cable licenses in the SCLLA.

[67] *See* NTIA Petition at 7.

[68] *See* NTIA Petition at 11.

[69] *See* Sullivan Study at 12. Article VII(2) of the Standard Draft provides, for example, that "[e]ach Party reserves the right to limit the extent to which aliens may establish, acquire interests in, or carry on enterprises engaged within its territories in communications, air or water transportation, banking involving depository or fiduciary functions, or the exploitation of land or other natural resources . . . ." *Id.* at 138. The negotiating history of the FCN treaties suggests that the term "communications" is viewed as including radio and television broadcasting, as well as telephone, telegraph and submarine cable services. *Id.* at 139. Similarly, the Annex to the Standard Draft of the BITs treaty reserves the right of the Parties to maintain limited exceptions to national treatment for inward direct investment in various sectors, including communications. *See* USTR, Standard Draft of the BITs Treaty (February 24, 1984).

[70] *See, e.g.*, Friendship, Commerce and Navigation Treaty and Protocol, April 2, 1953, United States-Japan, art. VII, 4 U.S.T. 2063, T.I.A.S. No. 2863; Friendship, Commerce and Navigation Treaty, October 29, 1954, United States-Federal Republic of Germany, art. VII, 7 U.S.T. 1839, T.I.A.S. No. 3593; Friendship, Commerce and Navigation Treaty, November 28, 1956, United States-Republic of Korea, art. VII, 8 U.S.T. 2217, T.I.A.S. No. 3947.

[71] *See* U.S.T. 2398, 2404, T.I.A.S. No. 4625 (1959). Moreover, Article V(3) of the treaty provides only that "[e]ach High Contracting Party undertakes not to intensify, within its territories, existing limitations as regards enterprises belonging to or controlled by nationals or companies of the other High Contracting Party which are already engaged in the activities cited in the preceding paragraph." *Id.* at 2405.

[72] Article 1402 of the U.S.-Canada Free Trade Agreement (FTA) states that, for the provision of services, "each Party shall accord to persons of the other Party treatment no less favorable than that accorded in like circumstances to its persons with respect to measures covered by this [services] Chapter." *See* H.R. Doc. 100-216, 100th Cong., 2d Sess. 455 (1988). Annex 1404 (C), Article 6 of the FTA further provides, however, that "[n]othing in this Agreement shall be construed: (a) to require a Party to authorize a person of the other Party (i) to establish, construct, acquire, lease or operate basic telecommunications transport facilities, or (ii) to offer basic telecommunications transport services within its territory . . . ." *See* H.R. Doc. 100-216, 100th Cong., 2d Sess. 471 (1988).

[73] This treaty was entered into in 1815. *See* 12 Bevans 49, 50, 3 stat. 228, Article IV superseded by Consular Convention of June 6, 1951, 3 U.S.T. 3426; T.I.A.S. 2494 (September 7, 1952).

[74] We note that the United States has used a public order justification for notifying the OECD of certain restrictions on foreign investment in the banking and insurance industries. *See* OECD Primer on National Treatment, *supra* note 57.

[75] *See, e.g.*, Second Revised Decision of the Council on National Treatment, OECD Primer on National Treatment, *supra* note 57. We note that the U.S. has taken certain exceptions in the past concerning foreign investment in communications relating to certain provisions of the Communications Act and the Communications Satellite Act. *Id.*

[76] *See* Article 3 of the Capital Movements Code, OECD (October 19, 1986) at 14.

[77] In this context, we note that Article 5 of the Convention on the Organization for Economic Cooperation and Development (OECD Convention) provides that: "the Organization may: (a) take decisions which, except as otherwise provided, shall be binding on all the Members;" *See* Article 5, OECD Convention, at p.15. We also note, however, that Article 6, Part 3 of the OECD Convention provides that "[n]o decision shall be binding on any Member until it has complied with the requirements of its own constitutional procedures . . . ." *See* Article 6, Part 3 of the OECD Convention, at p. 17. Article I, Section 8, of the U.S. Constitution provides that the Congress shall have the power "[t]o regulate Commerce with foreign Nations, . . . " *See* U.S. Constitution Article I, Section 8. Article II, Section 2 of the U.S. Constitution provides that the President " . . . shall have Power, by and with the Advice and Consent of the Senate, to make treaties, provided two thirds of the Senators present concur; . . . ." *Id.* Article II, Section 2. In this context, we note that while the OECD Convention was ratified in March, 1961, with the advice and consent of the Senate (*See* U.S.T. 1728, T.I.A.S. 4801), the OECD National Treatment Instrument and the Capital Movements Code are not listed in the official U.S. Department of State list of treaties in force. *See* United States Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in force on January 1, 1988.*

[78] Article 39 of the ITU Convention provides that "the relationship between the United Nations and the International Telecommunication Union is defined in the Agreement concluded between these two organizations, the text of which appears in Annex 3 of this Convention." *See* Article 39, ITU Convention. Article 1 of Annex 3 provides further that "the United Nations recognizes the International Telecommunication Union . . . as the specialized agency responsible for taking such action as may be appropriate under its basic instrument for the accomplishment of the purposes set forth therein." *Id.* at Annex 3, Article 1. Article 4, Part 1 of the ITU Convention provides that the purposes of the Union include: "(a) to maintain and extend cooperation between all Members of the Union for the improvement and rational use of telecommunications of all kinds . . ." and "(c) to harmonize the actions of nations in the attainment of those ends." *Id.* at Article 4, Part 1. Article 4 also provides that "[t]o this end" the ITU shall "(g) undertake studies, make regulations, adopt resolutions, formulate recommendations and opinions, and collect and public information concerning telecommunications matters." *Id.* Article 42 of the ITU Convention provides only that "[t]he provision of the Convention are supplemented by the Administrative Regulations which regulate the use of telecommunication and shall be binding on all Members." *Id.* at Article 42.

[79] Section 413 provides that:

> It shall be the duty of every carrier subject to this Act . . . to designate in writing an agent in the District of Columbia, upon whom service of all notices and process and all orders, decisions, and requirements of the Commission may be made for and on behalf of said carrier in any proceeding or suit pending before the Commission . . . .

See 47 U.S.C. § 413.

[80] *See, e.g., Id.* at §§ 501 and 502.

[81] As discussed above, and in the *Order*, AT&T, which is considered dominant for the provision of certain international telecommunications services is subject to less favorable regulatory treatment domestically, than carriers owned by foreign telecommunications entities which are also considered dominant for the provision of international telecommunications services. Indeed, we recently adopted a reporting requirement for AT&T that is similar to the reports filed by local exchange carriers under the *Armis Order*. *See* Automated Reporting Requirements for Certain Class A and Tier I Telephone Companies (Parts 31, 43, 67, and 69 of the Commission's Rules), CC Docket No. 86-182, 2 FCC Rcd 5770 (1987). Moreover, we note that carriers owned by foreign telecommunications entities are treated more favorably than other carriers that could be considered "like" enterprises --that is, interexchange carriers that are affiliated with local exchange carriers that have bottleneck facilities. In our *Competitive Carrier* proceeding, for example, we required that in order to qualify for forbearance domestically, an exchange carrier affiliate must have separate books of account and must not jointly own transmission or switching facilities with that exchange telephone company. We also stated that we would continue to apply full Title II regulatory scrutiny to exchange access tariffs. In particular, we stated that we would consider carefully complaints regarding rates for interstate services charged by affiliates of exchange telephone companies utilizing premium interconnections from those companies. *See Fourth Report and Order* and *Fifth Report and Order, supra* note 36. In this context, we note that Chairman Patrick has expressed his concern over the confidential nature of the franchise agreement between the Hong Kong government and Cable and Wireless and over the $2.50 accounting rate for telephone service between the U.S. and Hong Kong. *See* Letter from Dennis R. Patrick, Chairman, FCC, to the Honorable Anson Chan, Secretary for Economic Services, Government Secretariat, Hong Kong (July 18, 1988). Similarly, the Chief, Common Carrier Bureau has expressed concern whether C&W, through its arrangements with FTCC, would be receiving more favorable access to the United Kingdom, and, potentially at least one additional European market, than are its U.S.- owned competitors. *See* Letter from Dr. Gerald Brock, Chief, Common Carrier Bureau, FCC, to Phillip Spector (March 25, 1988).

[82] *See* 5 C.F.R. § 1320.4(a). *See also* Paperwork Reduction Act 44 U.S.C. § 3506 (5). As required by the Act, we hereby notify FTCC, CCI, and C&W that as an information collection request submitted to nine or fewer persons, our information collection request is not subject to the requirements of Section 3507 of the Paperwork Reduction Act.

[83] We note, for example, that in 1987 prices for direct dial calls from the United States generally were significantly lower than prices for direct dial calls from other countries to the United States and that the price differences tended to increase as the length of the call increases. *See, e.g.*, "Price Comparisons for International Dial Service in 1987," Industry Analysis Division, Common Carrier Bureau, FCC, Mimeo No. 1976 (March 7, 1988). Nevertheless, U.S. IMTS collection rates remain significantly higher than U.S. domestic MTS collection rates for calls of a similar distance.

[84] We note that FTCC itself expressed concerns, for example, about possible discrimination in international telecommunications in the context of our consideration of applications seeking authority to acquire and operate facilities for the provision of common carrier services to the Federal Republic of Germany. FTCC stated that the "operator of the gateway will control the bottleneck facility connecting all U.S. telephone carriers (other than AT&T and MCII) to West Germany." FTCC continued by stating that the operator "would be able to discriminate in favor of its own IMTS services in ways that may be blatant or subtle" and "could lie in the service area, such as giving better quality service to its own customers" or "could be economic, by ensuring that its competitors' costs to reach West Germany are higher than its own." *See* FTCC Petition for Interconnection Order (filed January 21, 1988) at 4. Subsequently, in granting Section 214 certification authority to US Sprint, we made it clear that we would retain strict regulatory oversight of competitive access to US Sprint's facilities to the F.R.G. based on the Bundespost's characterization of US Sprint's arrangements as a so-called "common gateway." *See* Memorandum, Opinion, Order, Authorization and Certificate, US SPRINT Application for authority to acquire and operate facilities for direct service to the Federal Republic of Germany, File No. I-T-C-88-015 (March 3, 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

LAND O'LAKES BROADCASTING CORPORATION
WTRJ (AM)
Troy, Ohio

MM DOCKET NO. 84-481
File No. BP-820720AK

Edward A. Baker d/b/a UNION CITY RADIO
Union City, Indiana

MM DOCKET NO. 84-489
File No. BP-821122AG

For Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1988; Released: January 3, 1989

By the Commission:

1. We have before us the comments that Edward A. Baker d/b/a Union City Radio (Union City Radio) and Land O'Lakes Broadcasting Corporation filed on February 23 and March 10, 1988, respectively, concerning resolution of this proceeding in light of the opinion of the Court of Appeals setting aside the Commission's previous decision in this case and remanding the matter for further consideration. *Baker v. FCC*, 834 F.2d 181 (D.C. Cir. 1987). We have also received reply comments from Union City Radio, filed on March 25. After reviewing this case again in compliance with the court's mandate, we have decided, for the reasons stated below, to grant Union City Radio's application and dismiss Land O'Lakes' competing application as moot.

I. BACKGROUND

2. Because Land O'Lakes and Union City Radio propose to serve different communities, the primary comparative consideration is which proposal would better provide for "fair, efficient, and equitable distribution of radio service" in accordance with 47 U.S.C. § 307(b). *See FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 361-62 & n.4 (1955). The Review Board determined that neither applicant is to be preferred for proposing to meet a more pressing need for new "reception" service. 103 FCC 2d 758, 760 ¶ 4 (Rev. Bd. 1986), rev. denied, 2 FCC Rcd 39 (1987). That determination is not in dispute. In order to resolve the section 307(b) issue, then, it is only necessary to determine which, if either, proposal would meet a significantly more pressing need for local "transmission" service.[1]

3. The main factors to consider in assessing Troy's need for a new local 1030 kHz station compared to Union City's are the number of each community's inhabitants and the number of radio stations that now provide -- or that presumably will provide -- transmission service to each community on other frequencies. *Baker*, 834 F.2d at 183 n.4 (citing *Radio Greenbriar, Inc.*, 80 FCC 2d 107, 109, recon. denied, 80 FCC 2d 140 (Rev. Bd. 1980)). There is no dispute as to the numbers of inhabitants. It is also undisputed that neither Troy nor Union City now receives transmission service from any radio station, and there is no contention that Union City has any material prospect of receiving transmission service on a channel other than the one at stake here.

4. There is controversy, though, concerning the prospect for transmission service in Troy on another frequency if we were to deny Land O'Lakes' application. Union City Radio contends that Troy will soon have transmission service even if we deny permission for Land O'Lakes to build a 1030 kHz station there. Union City Radio therefore urges us to grant its application and deny Land O'Lakes', as in so doing the Commission would promote the establishment of a first local station in a community that would otherwise go without transmission service, whereas granting Land O'Lakes' application assertedly would not have that result. Land O'Lakes contends, on the other hand, that granting either party's application would result in the establishment of a first transmission service, and therefore that size of population is the controlling factor for purposes of the section 307(b) assessment in this case. Accordingly, Land O'Lakes urges us to grant its application by reason of the fact that Troy is more populous than Union City.

5. The controversy about the prospect for local broadcast service in Troy on a channel other than 1030 kHz focuses on two circumstances: (1) that Land O'Lakes already holds a construction permit for an AM station to operate in Troy on 1510 kHz, and (2) that other applications are pending for permits to construct an FM station in Troy.

A. *Pertinent Prior Rulings of the Commission*

6. The facts pertaining to the first circumstance are as follows. Cloverleaf Broadcasting Corp. (Land O'Lakes' predecessor, owned by the same principals) received a construction permit in February 1979 for a 250-watt, daytime-only station on 1510 kHz in Troy, employing a six-tower directional antenna array. The station has not been built. In July 1982, Cloverleaf filed the instant application to modify the permit so as to specify nondirectional operation on 1030 kHz with much higher power (2500 watts) and a single antenna tower. Cloverleaf noted in a subsequently filed application to extend the 1510 kHz permit for six months that the 1030 kHz channel had become available for use at Troy by virtue of the Commission's recent decision to entertain applications for new daytime-only stations on Class I-A clear channels. BMP 820902AD, filed Sept. 2, 1982. The permittee asserted that the proposed station on 1030 kHz would place an interference-free signal over an area 16 times larger than the area that would be covered by the 1510 kHz station specified by its permit, that it would serve 15 times as many inhabitants, and that it would be far less costly to build than the 1510 kHz station, which requires an expensive antenna system. *Id.* The permittee explained that it did not want to expend large sums of money to build the specified 1510 kHz facility pending action on its application to modify the permit so as to authorize construction of a less costly and more efficient 1030 kHz station. *Id.*

7. Other parties, including Union City Radio, subsequently filed competing applications for 1030 kHz. The deadline for filing applications eligible for comparative consideration with that of Union City Radio (or for filing "major" amendments thereto) fell on November 22, 1981. 103 FCC 2d at 780 ¶ 63. In January 1983, Land O'Lakes submitted an amendment to redesignate its application as one for a *new* permit for a 1030 kHz station rather than as an application to modify its existing permit, declaring that it would not ask for further postponement of the date for completing construction of its proposed 1510 kHz station and that "the permit will be allowed to expire and/or surrendered for cancellation." It stated in a cover letter, though, that it was tendering the amendment only on the condition that the amendment not be regarded as necessitating assignment of a new file number (and consequent forfeiture of eligibility for consideration with the mutually exclusive applications for 1030 kHz stations then on file). The date last specified for completing construction of the 1510 kHz station passed in March 1983, at which time Land O'Lakes' conditional request to amend its application for modification of permit still awaited disposition. The Commission's Mass Media Bureau rejected the conditional amendment in May 1984, stating that "good cause has not been shown for . . . acceptance" and therefore that the amendment was "being returned. . . as you have requested." Land O'Lakes did not apply for review of that ruling.

8. A few weeks after having rejected Land O'Lakes' conditional amendment, the Bureau designated Land O'Lakes' application to modify its 1510 kHz permit for comparative hearing together with Union City Radio's competing application and other applications that are no longer pending. In June 1984, Land O'Lakes asked the presiding ALJ for leave to redesignate its application as one for a new permit, contending that such an amendment was warranted to reflect the fact that the permit's "expiration date" was past. The ALJ denied the motion for the reason that granting it would be tantamount to reversing the Bureau's predesignation denial of like relief. FCC 84M-3500 (Aug. 13, 1984). However, the ALJ declined to dismiss Land O'Lakes' application due to the "expiration" of the underlying permit, as urged by another party, holding that such action would amount to improper reversal of the hearing designation order. *Id.*

9. The ALJ held in the Initial Decision that Land O'Lakes' permit for a 1510 kHz station in Troy was still viable because the Commission had not decreed that Land O'Lakes had forfeited it. 103 FCC 2d 767, 781 ¶ 65 (Admin. L.J. 1985). He further held that, because Land O'Lakes was applying for modification of an existing permit for a station in Troy, its application would not be favored under section 307(b). "A Section 307(b) comparison between an application to improve facilities and one for a new station in a different community that has no local outlet tends to favor the latter." *Id.* at 780 ¶ 64. The ALJ therefore concluded that section 307(b) required that Union City Radio's application for a new permit for a first local station in Union City on 1030 kHz be granted in preference to Land O'Lakes' application. *Id.* at 785 ¶¶ 79-80.

10. The Review Board reached a different outcome. Although agreeing that Land O'Lakes' application was still an application to modify and that its permit was still viable, the Board reversed the ALJ's holding that Land O'Lakes was not to be credited with proposing a first local service. The Board maintained that it was clear from the record that Land O'Lakes would not build the 1510 station kHz already authorized for Troy, no matter how the Commission disposed of its instant application for a modified permit for a 1030 kHz station. Thus, the Board said, Land O'Lakes had rebutted the normal presumption that facilities authorized by permit will be placed in operation. The Board therefore refused to attribute a "fictitious" local 1510 kHz station to Troy for purposes of its section 307(b) analysis. 103 FCC 2d at 762 ¶ 9.

11. While this case was before the Board, Union City Radio pointed out that the Commission had recently allotted an FM channel to Troy and that six parties had applied for permits to build an FM station there. The Board took notice of those circumstances. But it held that they were immaterial to the section 307(b) issue because they did not ensure that Troy would receive local service in the "immediate" future. 103 FCC 2d at 763 n.1. The Board cited *Santee Cooper Broadcasting Co.*, 99 FCC 2d 781, 785 (Rev. Bd. 1984), recon. denied, 100 FCC 2d 469 (Rev. Bd. 1985), aff'd as modified on other grounds sub nom. *Women's Broadcasting Coalition, Inc.*, 59 RR 2d 730 (1986), aff'd, 812 F.2d 1443 (D.C. Cir. 1987) (per curiam), as authority for the proposition that bare frequency allotments and pending applications are to be disregarded in analysis under section 307(b) because they "do not sufficiently guarantee the 'eventuation of a station.'" *Id.* at 762 n.1.

12. Thus refusing to presume: (1) that Land O'Lakes would build a 1510 kHz station in Troy if denied a permit for a 1030 kHz station or (2) that an FM station would be established in Troy, the Review Board held that Land O'Lakes, as well as Union City Radio, was to be credited for proposing a first local "transmission" service. The Board then concluded that, in light of its larger population and other attributes, Troy had a greater need for first local service than Union City. *Id.* at 765 ¶ 16. The Board therefore ordered that Land O'Lakes' application was to be granted and that Union City Radio's was to be denied. As noted previously, the Commission denied review of these determinations without comment.

B. *The Ruling on Appeal*

13. Union City Radio appealed to the United States Court of Appeals on three grounds: (1) that the Commission had erred in failing to hold that Land O'Lakes' application to modify was void due to expiration of its permit; (2) that the Commission had erred in declining to presume that Land O'Lakes would build a 1510 kHz station; and (3) that the Commission had erred in disregarding the prospect for establishment of an FM station in Troy. The Court of Appeals rejected the first of Union City's contentions, affirming the holding that Land O'Lakes' permit is still in force and therefore that its application to modify is not void. 834 F.2d at 185. It did not address Union City's contention regarding the significance of the pending applications for an FM station in Troy.

14. The question of main concern to the court was that posed by Union City Radio's second principal contention on appeal: whether the Board and the Commission had erred in declining to attribute an "existing" 1510 kHz station to Troy under the section 307(b) issue. *Id.* The court agreed with the appellant that the Commission had erred in this regard. Specifically, the court held that the Commission had erred by deciding the question in a way

that was contrary to the precedent of *Santee Cooper*, without purporting to overrule or modify that precedent. *Id.* at 186 & n.5. According to the court, *Santee Cooper* stands for the principle that an extant construction permit is to be regarded as an existing station for purposes of analysis under section 307(b). *Id.* at 186. The court held that, unless the Commission overrules or modifies this doctrine, it must presume that Troy will receive local service from a 1510 kHz station if it were to deny Land O'Lakes' instant application for modification of its permit. *Id.* The court remanded this case for further consideration without ordering a particular outcome, leaving it to us to decide whether to "revisit" the doctrine of *Santee Cooper* at this point or to apply it "in its current shape." *Id.*

C. *Current Pleadings*

15. In its pleading of March 11, 1988, Land O'Lakes urges the Commission to modify the doctrine of *Santee Cooper* by holding that it will not presume that a station authorized by permit will be built where evidence persuasively shows that building the station is economically infeasible. Land O'Lakes points out that it proffered an exhibit to prove that it is infeasible to build a 1510 kHz station in Troy, but that the ALJ rejected the exhibit. Land O'Lakes asks us to consider the exhibit and conclude that a 1510 kHz station will not be built in Troy due to "market realities." In the alternative, Land O'Lakes requests that we order a further hearing to determine whether it is reasonably likely that Land O'Lakes or anyone else will build a 1510 kHz station in Troy.

16. The exhibit to which Land O'Lakes refers consists of a statement signed by William Coffey, Land O'Lakes' Executive Vice President, and a copy of a settlement agreement between Land O'Lakes' predecessor and the licensee of an AM station in Ohio. Coffey's statement alleges that there are four reasons why the 1510 kHz station had not been built: (1) such a station was economically marginal to begin with, due, among other things, to the low authorized power and the undesirable propagation characteristics of the authorized frequency; (2) the station would be expensive to build because of the specification of a six-tower array occupying a 24-acre tract of real estate; (3) zoning approval for the antenna site was finally granted in 1980 only on the condition that the permittee erect an eight-foot steel fence around the site, which would cost approximately $30,000; (4) under the settlement agreement the licensee of the Ohio station reserved the right to oppose granting operating authority for the prospective 1510 kHz station in Troy should proof of performance data show that radiation in certain directions was higher than predicted.

17. Land O'Lakes also states that in 1987 the Mass Media Bureau designated four applications for the FM channel allotted to Troy for comparative hearing; that one of those four FM applicants is Coffey Broadcasting, which is wholly owned by two of Land O'Lakes' three principals; and that Coffey Broadcasting entered into a settlement agreement with the other three FM applicants pursuant to which they would withdraw their applications, thus enabling Coffey to get an uncontested grant. However, Land O'Lakes alleges that the county zoning board "suddenly and unexpectedly" denied zoning approval for Coffey's proposed antenna tower; that Coffey's appeal of the zoning decree is still pending; and that Coffey has yet to find a new site in the limited area where it might situate the antenna consistent with the Commission's FM spacing requirements. Land O'Lakes asserts, moreover, that it might prove very difficult for Coffey to secure FAA approval for the FM antenna at a different site. Land O'Lakes therefore maintains that there is no assurance as yet that Troy will have an FM station.

18. Union City Radio contends that "since Troy has, pursuant to conclusions of the . . . Court of Appeals, an existing service," whereas Union City does not, the Commission must decide this case in favor of Union City Radio, by application of the general presumption that the need for a first local station in a community of "appreciable" size lacking any local broadcast service outweighs the need of a community with one or more local stations for additional local broadcast outlets, citing *Pasadena Broadcasting Co. v. FCC*, 555 F.2d 1046, 1050-51 (D.C. Cir. 1977).

19. Union City Radio disputes Land O'Lakes contention that the court's remand order leaves the Commission free to modify the doctrine of *Santee Cooper* in its decision on remand and apply such a modified doctrine in disposing of this case. On the contrary, Union City Radio maintains, the court's order compels the Commission to apply the prevailing doctrine, as the court perceived it, in this case, merely leaving it to the Commission's discretion to modify the doctrine prospectively for future cases. Union City Radio contends, moreover, that "retroactive" application in this case of such a modified doctrine – that is, of a doctrine that the existence of a permit merely engenders a rebuttable presumption that the authorized station will be built and operated – would be "fundamentally unfair and violative of due process" and "wholly unworkable." As another matter, Union City Radio contends that the question of which application is to be preferred if an "existing" local service is attributed to Troy is not before the Commission on remand, because the ALJ decided that question in Union City Radio's favor and Land O'Lakes has not challenged that ruling.

II. DISCUSSION

20. As we said at the outset, we have decided in light of our further review of this case on remand to grant Union City Radio's application rather than Land O'Lakes'. It is not necessary to that determination to compare the two applications at issue under section 307(b), as we shall explain. As we shall also explain, such comparison would lead to the same result, in any event.

21. If Land O'Lakes were to build the 1510 kHz station in Troy following denial of its application for modification, contrary to what it now represents is its intention, then it follows from settled doctrine that it would serve the stated objectives of section 307(b) to grant Union City Radio's application. Union City and Troy would each have a first local station in that case; by contrast, granting Land O'Lakes' application would leave Troy with one station and Union City with none. For the sake of discussion, though, we will take Land O'Lakes at its word and assume that it has had no intention whatever of building a 1510 kHz station in Troy since 1982.

22. Land O'Lakes has struck a peculiar and contradictory posture in disavowing any intention of building a 1510 kHz station in Troy even while holding a permit for such construction and prosecuting an application for modification thereof. In applying for a permit for a 1510 kHz station, Land O'Lakes implicitly represented that it

intended to build such a facility if the Commission were to grant the application. The Commission relied on that representation in issuing the permit. By operation of 47 C.F.R. § 73.37, the Commission has since precluded consideration of proposals for use of the same or adjacent channels that would theoretically interfere with the prospective signals of Land O'Lakes' yet-to-be-built 1510 kHz station. Therefore, if it is true that since the end of 1982 Land O'Lakes has had no intention whatsoever of building a 1510 kHz station in Troy, it should have surrendered its permit for cancellation at that time. Land O'Lakes kept the permit, however, without promptly and plainly informing the Commission of its change of intention. By continuing to hold the permit, which still remains in effect, Land O'Lakes has given the Commission reason to believe that it has intended all along (at least contingently) to build and operate the 1510 kHz station and hence to make use of the spectrum that the Commission has been reserving to accommodate that ostensible intention.

23. Land O'Lakes did not negate the commitment signified by its retention of the permit in applying in July 1982 for modification of the permit so as to provide for construction of a 1030 kHz station instead of the 1510 kHz facility. Rather, it effectively represented by so doing that it would *prefer* to build the proposed 1030 kHz station instead of the authorized 1510 kHz facility, but that it would build the latter should the Commission deny the application for modification. Had Land O'Lakes decided before then against building the 1510 kHz station under any circumstances, it could have conveyed its changed intention to the Commission by surrendering the permit and applying for a new permit for a 1030 kHz station rather than keeping the permit and applying for its modification. In that event, the Commission would not have continued to bar spectrum uses at odds with Land O'Lakes' original 1510 kHz proposal while considering its proposal for a 1030 kHz station.

24. Thus having elected at the outset to keep the 1510 kHz permit and apply for its modification rather than surrender it and apply for a new 1030 kHz permit, Land O'Lakes later found itself in a procedural predicament when it decided, in December 1982, that it would not build the 1510 kHz station if denied permission to build a 1030 kHz facility instead. The permit for the 1510 kHz station hurt its comparative posture against competing applicants for the 1030 kHz channel. Had Land O'Lakes rid itself of the permit then by surrendering it for cancellation, though, its application for modification of the permit would have been subject to dismissal as moot. Because the cutoff date for applying for the 1030 kHz channel had already passed, it was then too late for Land O'Lakes to substitute a newly filed application for a new permit for a 1030 kHz station in place of its application for modification and still be eligible for comparative consideration in this proceeding. 47 C.F.R. § 73.3571. Dismissal of its application for modification then (or at any later point) due to cancellation of the 1510 kHz permit would therefore have deprived Land O'Lakes of any chance of securing a permit for a 1030 kHz station in this proceeding.

25. Land O'Lakes sought to extricate itself from this predicament of its own making by amending its application for modification to restyle it as an application for a new permit; so amended, the application would not have been mooted by subsequent cancellation of the 1510 kHz permit. Its proper recourse would have been to surrender the permit in conjunction with the amendment, asking the Commission to refrain from cancelling the permit and dismissing its application before considering the tendered amendment. Land O'Lakes chose another tactic, however. It did not surrender the permit, nor did it assert in its contingent amendment of January 1983 that it had decided against building the 1510 kHz station under any circumstances. Rather, it represented in the motion that it would let its permit "expire" "and/or" surrender it *if*, and, presumably, only if, the Commission would accept its contingent amendment without assigning a new file number.[2] The necessary implication of Land O'Lakes' motion was that it intended to retain the permit and build the 1510 kHz station unless the Commission were to accept the proffered amendment or grant the application to modify.

26. Land O'Lakes' mere forbearance thereafter from asking for postponement of the date for completing construction did not suffice to give notice of its actual intention. The expiration of the allotted time for construction did not impair the permit's validity, *MG - TV Broadcasting Co. v. FCC*, 408 F.2d 1257, 1261 (D.C. 1968), and Land O'Lakes negated any inference of abandonment by retaining the permit and prosecuting its application to modify that authorization. Land O'Lakes could not have harbored any illusion to the contrary after the Bureau rejected the proffered amendment and designated the application to modify for hearing, thereby obviously indicating that the permit was still extant.

27. Nonetheless, Land O'Lakes retained the permit even after the release of the hearing designation order, in May 1984, some 18 months after Land O'Lakes abandoned the commitment on which its 1510 kHz permit is predicated. Instead of belatedly surrendering the permit at that point, Land O'Lakes continued to keep it while attempting once more to restyle its application by amendment. Its second motion to that purpose was like the first; Land O'Lakes did not assert in the second motion, either expressly or by necessary implication, that it had abandoned any intention of building the 1510 kHz facility under any contingency. Rather, by retaining the still-valid permit while moving again to restyle its application by amendment, Land O'Lakes merely indicated, as before, that it would not build the 1510 kHz station *if* the motion to amend were accepted.

28. In denying the second motion and retaining Land O'Lakes' unamended application in hearing status, the ALJ again made it plain that Land O'Lakes' permit was still deemed valid. Land O'Lakes nevertheless persisted in prosecuting its application for modification, still manifesting an intention to build the 1510 kHz station if denied permission to build a 1030 kHz station. It was only on filing exceptions to the initial decision, in September 1985, that Land O'Lakes finally asserted that it had long since abandoned any intention of building the 1510 kHz facility. "Exceptions to Initial Decision and Brief of Land O'Lakes Broadcasting Corporation" at 6 ¶ 4.

29. In short, although it has alleged that it abandoned all intention of building the 1510 kHz station late in 1982, 18 months *before* the commencement of this proceeding, Land O'Lakes failed to disclose its changed intention to the Commission until filing exceptions to the initial decision, some two and a half years later, and it has retained its still-valid permit to this day while continuing to prosecute an application to modify that is predicated

on the permit's validity. Land O'Lakes thus left a record showing by clear implication, at least, that it would build the 1510 kHz station if denied a modified permit. [3] Land O'Lakes retention of the permit since December 1982 for what appear to be purely tactical reasons was contrary to the public interest. In so doing, Land O'Lakes has preempted alternative uses of the spectrum for nearly six years to no legitimate end. And for nine and a half years the residents of Troy have been left waiting for new radio service to materialize from the Commission's grant of a construction permit to Land O'Lakes' corporate predecessor.

30. In light of its disavowal in 1985 of any intent to construct a 1510 kHz station, we hold that Land O'Lakes has effectively abandoned its permit, which we hereby declare to be forfeited. Land O'Lakes' application for modification is consequently moot. As the permit is extinct, there is nothing to be modified.

31. We note that we would dispose of this case in essentially the same way if it were necessary to consider Land O'Lakes' application on the merits. An applicant should not be permitted to derive an advantage by declaring an intention at cross purposes with its application. In filing and prosecuting an application for modification of a construction permit, retaining the permit in the meanwhile, Land O'Lakes has effectively represented that it has intended to build a 1030 kHz station as specified in its application should the application be granted and also to build a 1510 kHz station as currently specified in its permit should the application be denied. If Land O'Lakes would have the Commission grant its application on the premise that it no longer intends to carry out the construction for which its 1510 kHz permit gives authority, contrary to what it has signified in prosecuting an application for modification of that permit, then it was incumbent upon Land O' Lakes to amend the application so as to express that new intention. The two motions that it previously filed to that end having been denied below, we could not properly accord Land O' Lakes any comparative advantage because of its belatedly disclosed change of intention unless we were to reverse the pertinent rulings and accordingly hold that its application is to be regarded as one for a new permit. We decline to reverse those rulings.[4]

32. Despite Land O'Lakes' recent disavowal of any intention to build a 1510 kHz station in Troy, therefore, we would presume, in comparative assessment under section 307(b), that such a station would be established if we were to deny Land O'Lakes' instant application for 1030 kHz. To do otherwise would be to give Land O'Lakes credit in comparative evaluation for declaring an intention at odds with its application long after the parties to this proceeding were barred from securing comparative advantage through amendment. Such a holding would make a mockery of the policy against upgrading, as well as be contrary to the doctrine of *Santee Cooper*. In comparative evaluation, then, we would adopt the holding of the Initial Decision: Union City Radio is entitled to a decisive preference under section 307(b) for proposing to render first local broadcast service to a community of appreciable size, whereas Land O'Lakes merely proposes by its application to change the specified frequency of a prospective station in Troy that it already has permission to build.

33. Moreover, we would not regard Land O'Lakes' disavowal as material, even if we thought it proper to take account of it for purposes of comparative assessment. Considering that Land O'Lakes lost interest in building a 1510 kHz station in Troy only after it became obvious that its ostensible intention to do so was prejudicial to its chance of securing a permit for a station on a more desirable frequency, we must discount the opinion of Land O'Lakes' vice president that there is no economic potential for a 1510 kHz station in Troy. By retaining its permit since December 1982, when it assertedly gave up any intention of building the 1510 kHz station, Land O'Lakes has effectively prevented others from applying for a permit for a station on that frequency in Troy. Far from proving that no economically attractive opportunity exists for a broadcaster to provide service on 1510 kHz in Troy, Land O'Lakes' warehousing of spectrum raises the suspicion that it has retained the exclusive right to establish a 1510 kHz station in Troy in order to preempt anyone else from doing so while it sought authority for a 1030 kHz station there, thus preventing prior entry into its chosen market by a competitor. We therefore see no reason to entertain speculative arguments from Land O'Lakes concerning the prospect for establishment of a 1510 kHz station under different ownership.

III. ORDERS

34. ACCORDINGLY, IT IS ORDERED, That the construction permit for station WTRJ-AM, Troy, Ohio, IS CANCELLED and that the application of Land O'Lakes Broadcasting Corporation, File No. BP-820720AK, IS DISMISSED as moot.

35. IT IS FURTHER ORDERED, That the application of Edward A. Baker d/b/a Union City Radio for construction permit, File No. BP-82122AG, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Commission has defined "transmission service" as the provision of an opportunity for the development and expression of local interests, ideas, and talents and for the production of programs of special interest to a particular community. *Amendment of Sections 73.1125 and 73.1130 of the Commission's Rules, the Main Studio and Program Origination Rules for Radio and Television Broadcast Stations*, 2 FCC Rcd 3215, ¶ 5 (1987). Every broadcast station is assigned to a community of license with a primary obligation to provide transmission service to that community. *Id.* The Commission normally presumes that communities receive transmission service only from those stations that are specifically licensed to serve them. "Reception service" consists simply of the transmission of broadcast programing of acceptable technical quality.

[2] Assignment of a new file number would have excluded the amended application from comparative consideration. 47 C.F.R. § 1.227(b)(1) and (5). It would have been appropriate to assign a new file number on acceptance of such an amendment if the amendment were deemed to be "major," as defined by 47 U.S.C. § 73.3571(j), or if the application as thus amended were deemed equivalent to a new application.

[3] After indicating in oral argument before the Review Board that Land O'Lakes had earnestly tried to give up the permit, counsel for Land O'Lakes gave the following response when Board members pressed him for comment on his client's failure to take the obvious recourse of surrendering the permit:

> COUNSEL: . . . .
>
> Now I don't know what Land O'Lakes could have done with their construction permit, here. Maybe they could have had a burning, like a draft card burning, and burned the construction permit in a public place.
>
> MR. JACOBS: Oh, come on. You could have turned it in.
>
> COUNSEL: We could have turned it in. And that's very true, we could have turned it in, and I've often thought --
>
> CHAIRMAN MARINO: Right at the outset. And then you could have applied for the station, for the application --
>
> COUNSEL: Right at the outset. Well, we couldn't have applied -- or turned it in when we applied for the station because at the time when we applied for the station a decision had not yet been made that it was not feasible to construct a 1530 kilohertz, or a 1510 kilohertz facilities. But we could have turned it in a little later, and maybe we should have --

Tr. at 116-17.

[4] In the first of these instances, paragraph 7 above, Land O'Lakes requested the Bureau to redesignate its application as one for a new permit for a 1030 kHz station. Land O'Lakes has not applied for review of the Bureau's rejection of this motion. If it were to do so now, the appeal would be grossly dilatory. We are unwilling to waive pertinent procedural limitations and undertake spontaneous review of that prehearing ruling at this point, particularly in light of the disregard for the public interest that Land O'Lakes has displayed. The ALJ also correctly denied the second of Land O'Lakes' amendment motions. Land O'Lakes could not amend then, after the "B" cutoff date and after release of the hearing designation order, without good cause. 47 C.F.R. § 73.3522(b). Good cause for acceptance of the second amendment to restyle its application was plainly lacking. As the amendment was submitted after designation for hearing and had not been made necessary by circumstances beyond Land O'Lakes' control, moreover, it would not have been proper to allow any "upgrading" of Land O'Lakes' comparative standing predicated on acceptance of the amendment, in any event. *See Daytona Broadcasting Co., Inc.*, 97 FCC 2d 212, 215-16 ¶¶ 5-6 & n.10 (Rev.Bd. 1984), rev. granted in part, 101 FCC 2d 1010 (1985), modified, FCC 86-182 (released Apr. 18, 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 4, 1989

NATIONAL TELEPHONE SERVICES PETITIONS FOR DECLARATORY RULING THAT AT&T SHOULD ESTABLISH THROUGH RATES ON CALLS TRANSFERRED TO AT&T

National Telephone Services (NTS), a provider of operator services, has filed a petition seeking a Commission declaration that American Telephone & Telegraph (AT&T) must establish a through rate for calls transferred from NTS and a fair and equitable division of charges between AT&T and NTS. NTS contends that AT&T has established a through route but is refusing to create a through rate. It alleges that AT&T bills the caller not from the point of origination but from the point of interconnection. As a result, according to petitioner, NTS receives no compensation for its services and often must confront confused and angry customers who cannot understand their bill. NTS concludes that establishing a through rate and appropriate division of charges is in the public interest. Comments on the NTS petition must be filed within 30 days after the release of this Public Notice, and Reply Comments within 10 days thereafter. All filings should refer to File No. ENF-89-2.

Copies of the petition and any subsequently filed documents in this matter may be obtained from International Transcription Services, 2100 M Street, N.W., Suite 140, Washington, D.C. 20036, (202) 857-3800. NTS's petition and other documents will also be available for review and copying in Suite 6206, 2025 M Street, N.W., Washington, D.C. 20554.

For further information, contact Patricia Bowman at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re the Application of

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA — File No. W-P-C-6246

To construct, operate, own and maintain, on a trial basis, a cable television (CATV) transport system within a geographically defined residential area in the Borough of Perryopolis, Pennsylvania.

MEMORANDUM OPINION, ORDER AND CERTIFICATE

Adopted: December 22, 1988; Released: January 4, 1989

By the Chief, Domestic Facilities Division:

1. The Bell Telephone Company of Pennsylvania (BPA or Applicant) has filed the above-captioned application pursuant to Section 214 of the Communications Act of 1934, (the Act) 47 U.S.C. § 214, and Section 63.01 of the Commission's rules, 47 C.F.R. § 63.01, seeking Commission authority to construct, operate, own and maintain a fiber optic-based distribution system (System) to provide cable television channel services to Helicon Group Ltd., PA Division (Helicon), a franchised cable television services provider in Perryopolis, Pennsylvania. Applicant states that it seeks authority in order to provide channel services to Helicon on a trial basis for one year to determine the economic and technical feasibility of transporting video programming for franchised cable television service providers and providing telephone exchange services on an integrated basis via fiber optic technology. Applicant intends to provide telephone exchange service using the System to residential customers in the trial service area. In response to public notice of the application, James S. Williams, Tele-Dials of Pittsburgh, Pennsylvania (Williams) filed a petition to deny, which he called an "opposition." BPA then filed an opposition and Williams submitted a reply. For the reasons set forth herein we grant the application and deny Williams' opposition.

I. APPLICATION

2. BPA explains that the proposed System will consist of both fiber optic transport facilities and signal processing equipment. Helicon will provide, own and maintain a coaxial cable linking its programming location (head-end) to Applicant's facilities via pole attachments. Helicon's cable will be terminated on Applicant's pole located adjacent to its Perryopolis central office. Helicon's facilities will deliver video programming provided by Helicon to Applicant's facilities. Applicant will construct, own, and maintain facilities from the pole to the Perryopolis central office and will also construct, own and maintain the fiber optic facilities between the Perryopolis central office and the network demarcation points at Helicon's subscribers' locations. On the subscriber's premises the subscriber will supply a telephone instrument to be used for receipt and transmission of telephone calls. BPA will provide the optical network interface, which performs optical to electrical conversion, and Helicon will supply a converter, which processes the video programming signals using a terminal interface unit compatible with the optical network interface and also provides the interface for the television receiver. Additionally, BPA will provide, own and maintain the signal processing equipment located at the Perryopolis central office and on Applicant's side of the network demarcation points at Helicon's subscribers' locations. Applicant states that Helicon will be responsible for, and Applicant will have no control over, the type or content of video programming transmitted over the System. Helicon will use the equipment and facilities furnished by Applicant to provide cable television services to its residential subscribers in the trial service area and Applicant will provide telephone exchange services over these facilities to its residential subscribers in the same area.

3. Applicant relates that the proposed facilities and equipment will transport Helicon's video programming to 50 or 100 of its subscribers' residences. Two discrete video links (36 channels each) and two discrete dial tone lines will be provided to each of Helicon's subscribers via a single fiber. Helicon will have the capability of controlling access to premium video programming channels. Applicant explains that it will construct 1.3 route miles of fiber optic cable at a cost of $450,600 for outside plant, central office and support material and labor. Fiber optic facilities will be both aerial and placed in underground conduit in Applicant's rights-of-way.

4. Applicant declares that the deployment of fiber optic facilities for interoffice and feeder distribution systems permits transmission of large amounts of voice and data communications over fewer facilities, providing savings in maintenance expenses. BPA submits that the use of fiber technology has not yet, however, been extended to "the last mile" of the public switched telephone network, *i.e.*, the facilities that link subscribers to serving central offices. Applicant remarks that, until recently, technology has not been available that would permit the efficient provision of telecommunications services using fiber technology to the homes of subscribers. The technology that Applicant proposes to use, however, may permit it to provide telephone exchange services in a way which is both technically and economically feasible.

5. BPA emphasizes that the trial service proposed in its application is necessary to determine whether the technology performs within expected technical specifications and whether it can be deployed on a cost-effective basis. If the technology meets feasibility expectations, Applicant states, it may be used to provide services to BPA's subscribers and other cable television franchisees, bringing broadband facilities to the home. If it does not meet such expectations, says Applicant, the limited nature of the proposed trial will avoid severe economic dislocations to Helicon and itself. Moreover, Applicant's subscribers will suffer no injury because rates for telephone exchange services provided with the System will not be affected by this trial. Applicant stipulates that, during the trial, all the expenses and investment associated with the trial service will be kept in a separate memorandum record. Applicant explains that based upon the design of the loop electronics, which currently have the capacity for two video and two

telephone connections per fiber link, costs will be tentatively allocated between channel service and telephone exchange service on an equal basis. This allocation scheme will be subject to review as the trial progresses and may be revised. The costs associated with telephone exchange services will then flow through the separations system under Part 36, 47 C.F.R. Part 36. According to BPA, this mechanism will assure that the costs associated with the construction, operation and maintenance of facilities used to provide channel services will be separately accounted for. Helicon will have the exclusive right to utilize the video transport portion of the System subject to its franchised authority as a cable television provider in Perryopolis. An affidavit from the Mayor of the Borough of Perryopolis, part of the application, attests that Helicon holds a franchise to provide cable television service in Perryopolis. BPA emphasizes that it will have no control over the type or content of programming transported by the System and it will not share in any of the profits or losses from Helicon's offering of cable television service.

6. At the end of the trial period, Helicon's satisfaction, technical and economic feasibility and operational issues will be evaluated. If there are indications that the technology is economically and technically viable, the service will be priced at a compensatory rate and offered under tariff. If, after the one-year trial period, the technology used to provide cable television channel service proves not to be viable or Helicon is dissatisfied, cable television channel service will be terminated. Applicant submits that facilities and equipment used to provide telephone exchange services will remain in place to serve as replacement facilities for the existing deteriorated plant. Replacement of existing distribution plant was planned before the filing of its application, according to Applicant.

II. PLEADINGS

7. In his opposition, Williams states that BPA failed to notify him of its application, as required by the Commission's rules. Williams submits that grant of the application will restrain competition in communications by denying the public a choice of communications services. Williams' opposition also claims that Applicant is in violation of the "Sherman Anti-Trust Act by attempting to monopolize and restrain trade." Williams further maintains that "(BPA) is trying to get into the cable television business by circumventing 63-58 of the commission rules (exceptions) which has proper limitation thereto." Williams' Opposition at 3. Williams also questions the rights of a community to award a cable television franchise.

8. In response, BPA contends that Williams' opposition is defective on both procedural and substantive grounds. Applicant notes that Williams does not provide an affidavit as required by Section 63.52(c) of the Commission's rules, 47 C.F.R. § 63.52(c), and claims that his assertions lack merit. Applicant states that its proposal will make common carrier services available to a cable televison company where no facilities are otherwise available. This, BPA declares, will add additional choices in transport technology. BPA submits that its application will not put it in the cable television business; rather, it wants only to construct and operate facilities for the common carrier transmission of video programming which will be provided and controlled by Helicon.

9. In his reply to BPA's opposition, Williams offers a number of general allegations which reiterate his assertion that grant of the subject application would not be in the public interest.

III. DISCUSSION

10. Williams lists five arguments in support of his assertion that the Commission should deny BPA's application: lack of notification, market concentration, anti-trust violation, provision of cable television service by BPA, and franchising authority. Williams' procedural assertion regarding notification is without merit. While he does not point to any Commission rule that entitles him to notice that BPA has violated, Williams argues that BPA was under an affirmative obligation to apprise him of its intent to seek Section 214 authority to provide channel service. There is no such Commission rule. Section 214 of the Act and the Commission's rules require that copies of an application be sent to the Governor of the State of Pennsylvania and the Secretary of Defense. (BPA certified its dispatch of copies to those parties, and the Commission's public notice of July 20, 1988 referenced the subject application.) No further notice to Williams was or is required.

11. Williams' argument that grant of BPA's application will forestall competition is based on the allegation that BPA's provision of channel service will restrict cable television development. Williams concludes that this is an anti-trust violation. The record indicates that the purpose of BPA's project for the first 12 months is to test fiber optic distribution facilities to provide integrated services to a small group of subscribers. Helicon, the programmer used by BPA to load its broadband facility, will not be charged during the test period,[1] and telephone subscribers will not be surcharged for use of fiber optic facilities. During this test period there is no general offering on a common carrier basis of cable television channels. If after 12 months of operation BPA judges the trial to have been successful, it will file a tariff that will include a provision for compensatory charges.[2] *See* Illustrative Tariff at 16, Application at pp. 7-11. At that time, pursuant to Sections 1 and 2.1 of its Illustrative Tariff, BPA will offer its services on a common carrier basis, exercising decisions concerning choice of subscriber and provision of similar facilities to others. Application at 7. Under these circumstances, we cannot agree with Williams that competition is or will be adversely affected by BPA's proposal, or that there is an unreasonable restraint in the availability of cable television channel service caused by activation of BPA's proposed System. Williams, moreover, does not appear to be qualified to demand cable television service from BPA because he is not a cable television franchisee.[3] Nevertheless, should Williams successfully subscribe to tariffed cable television channel service at the end of the test period, he will be the beneficiary of the innovations fostered through BPA's tests.

12. Williams' challenge to the validity of the local franchising authority is similarly without merit. We generally assume the validity of local franchise decisions, (*see* Memorandum Opinion, Order and Certificate, 3 FCC Rcd 2317 (1988)) and see no reason to question Helicon's franchise. Moreover, Williams has offered no evidence that BPA's proposal is not in the public interest. We therefore reject all of Williams' arguments.

13. The system proposed is for only 50-100 potential subscribers and represents an economic/technological test for the first 12 months of operation. BPA indicates that there will be a 50-50 allocation of costs between cable television capacity and telephone service. It will keep expenses and investment associated with the trial service in a separate account, and it states it will apply Part 36 of the rules to assure that costs associated with the construction, operation and maintenance of facilities used to provide cable television channel services will be separately accounted for and will not be borne or subsidized by intrastate ratepayers who subscribe to other common carrier services. The consequence of erroneous allocation may be cross-subsidization of cable television channel service by telephone subscribers. In order to determine how BPA has finally allocated its costs during the test period and how it intends to allocate costs should it decide to offer its optical fiber-based services following the test, we will include a condition that will require it to submit an accounting report. We expect it will not include costs associated with the cable television tests as part of any rate base or as regulated expenses without prior Commission authorization. In addition, in order to monitor BPA's test, we will require BPA to submit reports on August 1, 1989 and 30 days after termination of the test. The final report should describe the results of the trial and BPA's intentions concerning availability of its test services on a common carrier basis.

IV. CONCLUSION

14. We have considered and rejected the arguments presented by Williams opposing BPA's application. We believe that the public convenience and necessity will be served by grant of the subject application. Grant will create an opportunity for BPA to use new technology on a trial basis, permitting it to gain knowledge about the technical and economic feasibility of deploying fiber technology to the home to provide integrated services. We find these goals to be in the public interest. In allocating its costs between cable and telephone operations for this trial, we expect BPA generally to follow the costing principles of CC Docket No. 86-111, 2 FCC Rcd 1298, *recon.* 2 FCC Rcd 6283 (1987); *further recon.*, FCC 88-355 (released November 16, 1988); petition for review pending, *Southwestern Bell Telephone Co. v. FCC*, D.C. Cir. No. 87-1764 (Filed December 14, 1987); *NTCA v. FCC*, D.C. Cir. No. 87-1771 (Filed December 15, 1987), but to treat costs associated with the cable television facility as below-the-line expenses pending analysis of the reports it is to submit. We will authorize the construction and operation of the fiber optic-based distribution system proposed by BPA, and we will require BPA to submit a final report detailing the costs it has allocated to each service and the costs it will allocate for common carrier services to be offered as a result of the trial.

15. Accordingly, IT IS ORDERED, that the application of The Bell Telephone Company of Pennsylvania for authorization under Section 214 of the Communications Act of 1934, as amended, to construct, operate, own and maintain the fiber optic-based distribution system it describes in the subject application in the Borough of Perryopolis, Pennsylvania IS GRANTED.

16. IT IS FURTHER ORDERED, that grant of the application provided for herein IS SUBJECT TO the following CONDITIONS:

a. BPA shall submit to the Chief, Domestic Services Branch, Common Carrier Bureau, on August 1, 1989, and 30 days following termination of the test, a comprehensive written report containing the following matters:[4]

1. Construction progress;

2. Total number of hours of operation of the Perryopolis fiber system and the amount of bandwidth employed by cable television programming services and, separately, dial tone telephone services;

3. A discussion of all uses made, including tests conducted, the purposes of the tests, the type, the conclusions reached, and copies of any publicly available discussions of BPA's use of Perryopolis fiber facilities of which BPA is aware.

b. BPA shall submit to the Chief, Domestic Services Branch, Common Carrier Bureau, within thirty days of the termination of its trial program, a report detailing the costs it has allocated to each service and the costs it will allocate for common carrier services to be offered as a result of the trial. No costs associated with the testing of the Perryopolis cable television facilities shall appear in any Bell Telephone Company of Pennsylvania rate base or as a regulated expense prior to authority from this Commission.

17. IT IS FURTHER ORDERED, that Williams' Opposition IS DENIED.

18. This Order is issued under Section 0.291 of the Commission's rules and is effective upon its release. Failure of The Bell Telephone Company of Pennsylvania to decline the authorization as conditioned within thirty-one (31) days from the release date will be construed as formal acceptance.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] According to the record, Helicon already has an operating coaxial cable television distribution system that serves the area encompassed by BPA's proposed test.

[2] The revised tariff would be filed with this Commission. We note that BPA's use of Helicon as a source of programming to test its fiber optic system does not violate Section 63.54 of the rules. We also note that extension of cable television channel service to more than the 100 subscribers encompassed by the subject application could constitute an extension of lines that would require additional authorization under Section 214 of the Act.

[3] We note that the Chief, Domestic Radio Branch directed a letter to Williams on February 12, 1988 which stated that Williams' use, as he described it, of existing carrier facilities appears

to constitute resale of interstate services, which the Commission has deregulated. The letter did not constitute an issuance of authority to provide cable television service in Perryopolis, a matter more properly decided by local authorities.

[4] We anticipate that BPA will have made its final assessment of its trial within 30 days of test termination. The final report should contain BPA's overall assessment of its trial and its plans for offering the services on a common carrier basis.

Before the
Federal Communications Commission
Washington, D.C. 20554

Joint Applications of the Lo-Jack Corporation and the Department of Highway Safety and Motor Vehicles of the State of Florida for an experimental license to operate a stolen vehicle recovery system	File Nos. 0852-EX-PL-88 0853-EX-PL-88

ORDER

Adopted: October 13, 1988; Released: January 4, 1989

By the Commission:

1. By this action, the Commission grants the Lo-Jack Corporation (Lo-Jack) and Department of Highway Safety and Motor Vehicles of the State of Florida (Florida DHSMV) authority to operate and conduct a market test of an experimental stolen vehicle recovery system on 173.075 MHz in the State of Florida.

BACKGROUND

2. The Lo-Jack vehicle recovery system consists of a radio receiver-transmitter installed in a hidden location in the motor vehicle; tracking devices mounted in police vehicles; and a computerized network of radio transmitters. When a vehicle equipped with a Lo-Jack device is reported stolen, the vehicle's unique identification code is transmitted on the network. When this signal is received by the stolen Lo-Jack-equipped vehicle, the transmitter portion of the device is activated and begins transmitting its identification code which is then tracked by specially equipped police vehicles. Vehicle transmissions are of very short duration (approximately 200 milliseconds every 10 seconds) and occur on the same frequency.

3. On March 10, 1986, experimental authority was granted to Lo-Jack and the Massachusetts' Department of Public Safety to operate and conduct a market test of the Lo-Jack system in the State of Massachusetts. Subsequently, on March 31, 1988, Lo-Jack filed a Petition for Rule Making (RM-6362) requesting that 173.075 MHz be allocated for a new stolen vehicle locator service and that law enforcement and public safety departments be eligible for licensing in this service.

4. On September 23, 1988, Lo-Jack and the Florida DHSMV filed applications under Part 5 (Experimental Radio Service) for the purpose of expanding the demonstration of the Lo-Jack stolen vehicle recovery system to the State of Florida. In conjunction with this application, Lo-Jack requests authority to conduct a market test of its system components. Lo-Jack, in its request for expansion of the market test to the State of Florida, states "given the geographic and demographic differences between Massachusetts and Florida, it would be extremely valuable to both the Lo-Jack and the law enforcement community to test Lo-Jack's success in Florida." As in the Massachusetts experiment, Lo-Jack indicates it will provide a full refund to consumers of the purchase price of any system component in the event that the FCC does not authorize the system on a permanent basis.

DISCUSSION

5. The expansion of experimental authority and the market test of the Lo-Jack system to the State of Florida appears warranted. Geographical differences between Massachusetts and Florida should provide useful information necessary for the design and implementation of stolen vehicle recovery systems. In addition, demographic differences, such as the high number of part-time residents and tourists in the State of Florida, should yield important marketing data. As a further matter, we intend to act expeditiously on Lo-Jack's rule making petition. We, therefore, do not anticipate action on any additional requests for experimental authority prior to completion of this rule making. We believe that the Massachusetts experience and the Florida test, granted herein, should provide sufficient information for the proceeding.

6. Accordingly, IT IS ORDERED, that, pursuant to the authority contained in Sections 4 (i), 7(a) and 303(g) of the Communications Act of 1934, as amended, the applications of Lo-Jack Corporation and the Department of Highway Safety and Motor Vehicles of the State of Florida, File Nos. 0852-EX-PL-88 and 0853-EX-PL-88 ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 86-404

In the Matter of

Amendment of Part 90,
Subparts M and S of the
Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1988; Released: January 4, 1989

By the Commission: Commissioner Quello dissenting in part and issuing a statement.

I. INTRODUCTION

1. In February 1988, this Commission adopted a *Report and Order* [1] establishing one set of rules for most land mobile operations above 800 MHz.[2] Some land mobile user groups ask us to reconsider or clarify a few points, particularly those points relating to the operation of Specialized Mobile Radio (SMR) systems. In this *Memorandum Opinion and Order* (MO&O) we consider the issues that the user groups raise and clarify certain aspects of our *Report and Order*.

II. BACKGROUND

2. Prior to our *Report and Order*, two separate sets of rules governed private radio channels above 800 MHz. [3] Under Subpart M, 200 channels were available for operation in the trunked mode to any person eligible under Part 90.[4] Under Subpart S, 250 channels were grouped into four categories or "pools": Specialized Mobile Radio (80 channels), Industrial/Land Transportation (50 channels), Business (50 channels), and Public Safety/Special Emergency (70 channels). Applicants in each of these categories could choose trunked or conventional technology. Subpart S also governed 150 additional channels that any Part 90 eligible could operate in the conventional mode. Subparts M and S had different eligibility requirements, loading standards, and application processing procedures.[5]

3. To establish one set of regulations applicable to all licensees above 800 MHz, we initiated the present proceeding.[6] The *Report and Order* eliminated Subpart M and modified many of the rules governing operations above 800 MHz. Specifically, it transferred the 200 Subpart M trunked channels to the Subpart S SMR pool, permitted partial assignments of channels, modified loading requirements, expanded SMR end user eligibility, and modified our rules pertaining to channeling and mode of operation of SMR systems.

4. In May 1988 the National Association of Business and Educational Radio, Inc. (NABER) filed a petition asking us to clarify the aspects of the *Report and Order* dealing with rural loading standards and private carrier operations above 800 MHz. Subsequently, seven user groups filed a joint petition asking us to reconsider the portions of our decision expanding eligibility requirements for SMR end users and transferring all trunked channels formerly governed by Subpart M of the Rules into the SMR channel pool contained in Subpart S.[8] In response to the Joint Petition, the Association of American Railroads (AAR) and Association of Maximum Service Telecasters (MST) filed supporting comments,[9] and the American SMR Network Association (ASNA) filed opposing comments.[10] The Joint Petitioners filed a Reply to ASNA's Comments.[11]

III. DISCUSSION

A. Expansion of Eligibility

5. Prior to the *Report and Order*, SMR licensees could serve only those entities who were themselves eligible to be licensed under Part 90 of our Rules. Thus, only businesses, emergency organizations, and state and local government agencies could become SMR customers. Federal government agencies, individuals, and representatives of foreign governments could not become SMR customers and, as a result, had more limited communications options available to them.[12]

6. In the *Report and Order*, we expanded end user eligibility, making it possible for federal government agencies and individuals to use SMR services. We continued, however, to preclude SMR operators from serving foreign governments. Our actions were based on the belief that expanding eligibility in this manner would make new communications options available and might encourage more intensive use of SMR frequencies in rural areas. *Report and Order*, 3 FCC Rcd at 1842.

7. The Joint Petitioners, AAR, and MST ask that we reconsider our decision to permit SMR operators to serve federal agencies and individuals. These commenters present two arguments, both of which we addressed in the *Report and Order*. First, they argue that expanding eligibility might change the private carrier status of SMR systems. They also argue that we failed to demonstrate a need for the federal government and individuals to access SMR spectrum, and furthermore, expanding eligibility of SMR users could overcrowd the spectrum.

Private Carrier Status

8. The Joint Petitioners and AAR argue that expansion of eligibility fundamentally changes the nature of private radio services and could jeopardize the private carrier status of SMR systems. Joint Petition at 4-12; AAR Comments at 3; Joint Reply at 4. This argument relies on the Joint Petitioners' interpretation of the statutory provisions added by the Communications Amendments Act of 1982 (1982 Act) and the accompanying legislative history. *See* H.R. Rep. No. 765, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Ad. News 2298 (Conference Report). In the 1982 Act, Congress defined private land mobile radio services and enunciated a test that distinguished them from common carriers.[13] The Joint Petitioners argue that allowing individuals and the federal government to receive SMR service effectively destroys the concept of eligibility, thus undermining Congressional intent to define private land mobile service as available to only a

limited class of entities. In short, the Joint Petitioners argue that Congress expected some significant eligibility restriction to remain in effect.[14]

9. ASNA, on the other hand, supports the expansion of eligibility. According to ASNA, expansion of SMR end user eligibility will not fundamentally alter private radio services. ASNA further states that the legal basis for our decision is reasonable and should withstand any challenge. ASNA Opposition at 4.

10. In the *Notice* in this proceeding, we specifically asked for comment on whether expanding eligibility to include federal agencies and individuals would alter an SMR's status as a private carrier.[15] We fully considered this issue in the *Report and Order* and concluded that the legal status of SMRs will not be affected by an expansion of the pool of eligible SMR end-users.[16] In these petitions for reconsideration, the Joint Petitioners have raised no new issues of fact or arguments of law that require a different conclusion on this issue. In the 1982 Act, Congress amended Section 331 of the Act to establish a functional approach for distinguishing between private land mobile and common carrier services. The test turns on whether the licensee resells for profit the telephone exchange services or facilities of a common carrier. Because SMRs do not resell the exchange services or facilities of a common carrier for profit, we correctly concluded that our decision to expand eligibility would not affect their classification as private carriers.

11. The Joint Petitioners continue to argue, however, that Section 331 establishes a two-pronged test of private carriage entailing both the resale test and that a private carrier be permitted to serve only those entities that have traditionally been eligible to receive service under Part 90 of our Rules, 47 C.F.R. § 90.342 *et seq*. We recently considered this proposition in affirming the Private Radio Bureau's decision that a private land mobile licensee's violation of the eligibility rules does not *ipso facto* transform the licensee's operations into common carriage.[17] In that case, we recognized that the resale test of Section 331(c)(1) applies only to the private land mobile services as defined by Section 331(c)(1) itself and Section 3(gg) of the Act. Under these provisions, a private land mobile service entails service to eligible users. We noted, however, that eligibility of system users is not statutorily prescribed but is within this Commission's discretion. In other words, the power to define the classes of eligible users for private land mobile services continues to lie with this Commission.[18] The 1982 Act in no way limits our authority to modify our eligibility rules.[19] Thus, we affirm our previous conclusion in this proceeding that our decision to expand end user eligibility for SMR services does not alter their legal status as private carriers under Section 331 of the Act. Conference Report at 54.

Effect on Spectrum Demand

12. The Joint Petitioners, AAR, and MST also question whether the federal government and individuals need SMR services, in light of other services available to them, and argue that additional eligible users could overburden spectrum that already is crowded. The Joint Petitioners present two alternative scenarios. Either the federal government and individuals do not need SMR services (in which case there is no need to add them as eligible end users) or these groups have a strong need for SMR services (in which case their sharing the spectrum will lead to a shortage to the detriment of traditional private radio users). Joint Petition at 12-13. The Joint Petitioners argue that the expansion of SMR end user eligibility, coupled with our intercategory sharing rules, will make fewer 800 and 900 MHz channels available for existing eligible users. *Id*. at 13-14. They also argue that other alternatives available to individuals and the federal government should be sufficient to meet the needs of these two groups. *Id*. at 14.

13. AAR agrees with each of the Joint Petitioner's arguments on this issue while MST expands on the Joint Petitioner's arguments. MST believes that expanding eligibility would encourage government agencies to use their own spectrum inefficiently, increase the strain on the SMR spectrum, and drive up service prices. MST Comments at 2. MST suggests that we consider the federal government's need for SMR services on a case-by-case waiver basis.

14. ASNA, on the other hand, argues that expansion of eligibility will not have a substantial effect on spectrum availability. ASNA predicts that there will be a moderate demand for service to the two new groups of eligibles and that this demand is likely to occur in areas where spectrum shortages are not anticipated. ASNA Opposition at 5. ASNA states that the demand for SMR service by individuals would be more likely to occur in rural areas than in urban areas because paging, cellular radio, and other non-dispatch-oriented alternatives are available to individuals in urban areas. *Id*. at 6. With respect to the federal government, ASNA states that demand for SMR service is likely to develop in non-urban areas where the government has very small fleets of vehicles. ASNA bases this opinion on the assumption that federal agencies with operations of any substantial size would want communications systems under their own control. In response to ASNA's Comments the Joint Petitioners argue that rural cellular service will be available in the future as an alternative for individuals and the federal government could run an SMR-type system for federal agencies on the federal government's own frequencies. Joint Reply at 5.

15. As we stated in the *Report and Order*, expanding eligibility merely provides an option to two new groups and, as such, should not overburden the spectrum. *Report and Order*, 3 FCC Rcd at 1841. While expanding eligibility increases the number of *potential* users, it does not require any SMR operator to serve either group, nor is it likely that all new eligible users will use the new option available to them. *Id*. Where an SMR provides a viable option and has the ability to serve these new eligibles, we believe that the SMR's service to these eligibles is in the public interest.

16. We are not persuaded to restrict SMR end user eligibility simply because there are other options available to federal agencies and individuals. If we accepted this position, we would not permit SMR systems to serve any existing groups of customers because each of these groups also can use a common carrier or operate its own system. Like the groups of existing users, federal agencies and individuals should have the option to select the communications method most appropriate and cost-effective for their operations.[20] Offering additional communications options to the federal government is particularly in the public interest because it can reduce the cost of federal communications service, thereby reducing the burden to the taxpayer.

17. Our expansion of eligibility should have little, if any, effect on the availability of channels to non-SMR licensees. To the extent that the Joint Petitioners argue

that fewer SMR channels will be available for non- SMR licensees to share, we note that intercategory sharing is permitted only on unassigned channels. There is little sharing today of SMR channels by non-SMR systems in urban areas because the channels are already assigned to SMR licensees. In these urban areas, the recently released 900 MHz spectrum should relieve the need for non-SMR systems to gain access to SMR channels. In most rural areas, there are enough non-SMR channels available to render intercategory sharing unnecessary.

18. The Joint Petitioners also imply that our expansion of eligibility will increase demand for SMR service, causing SMR systems to become fully loaded and to expand into non-SMR channels through intercategory sharing. Our action placing 200 trunked channels into the SMR pool will help to address this concern.[21] *See* infra. Moreover, we find that it is consistent with Commission policy for channels to be used and not to lie fallow. SMR systems would gain access to other pools through intercategory sharing only if the persons for which that pool is designated are not using the channels. To the extent that the eligible users in the pool are using the channels, the frequency coordinator could turn down a request for intercategory sharing.

19. Finally, we cannot agree with MST's arguments that expanding eligibility will cause SMR prices to increase or the federal government to use its spectrum inefficiently. Because there are other communications options available to SMR end users, SMR system operators must price their services competitively or lose existing and potential customers. We do not anticipate that because there is a new alternative available to the federal government it will begin using its own spectrum less efficiently. Rather, we expect the federal government to use SMR services in situations where the SMR operator can offer less costly communications service than the federal government can provide for itself. For example, in areas where the government has a small number of vehicles, the high cost of building and maintaining a communications system may not be justified given an SMR alternative.

20. In view of the above discussion, we affirm our decision to expand end-user eligibility for SMR systems. Allowing both federal government entities and individuals to obtain service from SMR licensees will be beneficial. Such action will provide additional service options to both these end-user groups and the SMR licensees and promote more extensive and efficient use of the spectrum. Furthermore, neither the status of the SMR service nor the availability of spectrum for private land mobile users should be significantly affected.

B. Transfer of 200 Subpart M Channels

21. The commenters also take issue with the treatment of the 200 trunked channels previously governed under Subpart M. Prior to our *Report and Order*, both SMR and non-SMR systems could be licensed on the channels, but few applications were filed for non-SMR systems. As of the date of the *Report and Order*, only thirteen (approximately one percent) of the licensees on these channels were non-SMRs, and all applicants on the waiting lists intended to operate SMR systems. *See Report and Order*, 3 FCC Rcd at 1842.

22. The *Report and Order* merged Subparts M and S of our Rules and, in the process, transferred the 200 trunked channels to the SMR pool governed by Subpart S. Through that action, we established a single procedure for processing 800 and 900 MHz SMR applications. Under the new Subpart S, only SMR systems can use the 200 channels, except as noted below. Non-SMR systems that already are licensed on any of the 200 channels, however, may continue to use the channels and expand their systems. Non-SMR systems also will be able to gain access to the channels through intercategory sharing. *See* 47 C.F.R. § 90.621(g).

23. The Joint Petitioners and AAR ask us to reconsider our decision to transfer the 200 channels to the SMR pool. Although few non-SMR systems currently are licensed on the 200 channels, the Joint Petitioners argue that non-SMR systems will need this spectrum in the future. Joint Petition at 18. They state that non-SMR systems may not desire to purchase communications services from an SMR and should not be required to do so. *Id.* The Joint Petitioners urge us to commence a separate proceeding to determine the regulatory treatment of the 200 channels. Alternatively, they suggest that we permit non-SMR systems to be licensed on the channels and, if we are concerned with uniform rules for SMR systems, that we make non-SMR operators on the 200 channels subject to the same rules governing SMR operation. *Id.* at 19.

24. AAR supports the Joint Petitioners' views and is particularly concerned that the 200 channels remain available in non-urban areas. AAR points out that the 200 channels have been assigned in the major markets but are not used heavily in smaller markets. AAR reasons that, based on current demand for SMR services in smaller markets, there is no compelling need to reserve the 200 channels for SMR service. AAR Comments at 3.

25. ASNA supports the Commission's decision to transfer the 200 channels to the SMR pool. ASNA says that, of the four channel pools in Subpart S, transferring the channels to the SMR pool is the most logical choice because SMR systems constitute 99 percent of current licensees on the 200 channels. ASNA Opposition at 2. ASNA points out that the channels will remain available to non-SMR systems through intercategory sharing. In response to ASNA, the Joint Petitioners argue that access to the channels through intercategory sharing does not have the same degree of certainty as direct eligibility. Joint Reply at 6.

26. As we said in the *Report and Order*, it is in the public interest to designate these channels for the category where they are used most and where demand is greatest. *Report and Order*, 3 FCC Rcd at 1842. SMR systems constitute 99 percent of current licensees on the channels and SMR systems are the only applicants on the waiting lists. Non-SMR systems profess a future need for the channels but, with the minor exception of thirteen licensees nationwide, make little existing use of the channels. It is both logical and administratively efficient to include these 200 channels in the SMR pool.

27. We also conclude that there is no need to initiate further proceedings regarding the regulatory treatment of these channels. Non-SMR licensees can expand using available channels in their own pools, or they can ask for channels from the SMR pool through intercategory sharing. Non-SMR licensees have not demonstrated a need for the 200 channels at this time or in the near future. Although the Joint Petitioners assert that intercategory sharing cannot provide any assurance that their future spectrum requirements will be met, we do not agree. If there are no channels available in the applicant's own

pool ,and an available channel in the SMR pool is the most appropriate for the applicant's needs, there should be no impediment to obtaining the channel through intercategory sharing.[22] Upon consideration of the arguments before us, we affirm our decision to transfer the 200 channels to the Subpart S SMR pool.

C. Private Carrier Operations Above and Below 800 MHz

28. Before the *Report and Order*, there was some confusion among 800 and 900 MHz licensees as to which frequencies they could use to operate for-profit private carrier systems. Frequently, licensees in the Industrial/Land Transportation Pool or the Business Pool believed that they could use their frequencies to operate for-profit private carrier systems. To the contrary, the Rules permitted private carrier operations above 800 MHz only in the SMR Pool and on private carrier paging frequencies. We clarified this point in the *Report and Order*. *Report and Order*, 3 FCC Rcd at 1849.

29. To dispel the confusion about private carriage above 800 MHz we changed the caption and language of the section of our Rules dealing with shared use, 47 C.F.R. § 90.179. This section formerly contained general language permitting licensees to share a radio station with other eligible users on either a non-profit, cost-shared basis or on a for-profit private carrier basis. In the *Report and Order*, we added a statement that this section of the rules applies only below 800 MHz.

30. NABER filed a petition asking the Commission to clarify this issue. NABER is concerned that in amending the Rules we may have inadvertently precluded non-profit communications cooperatives and community repeaters above 800 MHz. NABER Petition at 3-4. We agree with NABER that further clarification is warranted.

31. By modifying Section 90.179, the Commission did not intend to prevent non-profit cooperatives or community repeaters in the three non-SMR pools above 800 MHz. There is a need among 800 MHz licensees for shared use and we will not eliminate this spectrum-efficient communications option. We intended only to clarify that frequencies above 800 MHz are available to entrepreneurial licensees only in the SMR pool. Frequencies in the other pools above 800 MHz, therefore, remain available to eligible individual licensees and non-profit communications cooperatives. Accordingly, we will amend the caption of Section 90.179 to its original form and add language reiterating that private carrier operations above 800 MHz can only be conducted by SMR pool and 900 MHz private carrier paging licensees.

D. Loading Requirements in Rural Areas

32. Before the *Report and Order*, the Commission's loading standards for trunked systems were the same for rural and urban areas. They varied, however, depending upon whether Subpart M or Subpart S applied to the particular channels involved. Subpart M required rural and urban licensees to load their systems to 70 mobiles per channel within five years to retain their full complement of channels and 80 mobiles per channel to obtain additional channels. Subpart S required rural and urban licensees to load their systems to 60 mobiles per channel by the end of three years and to 80 mobiles per channel by the end of five years, otherwise channel cancellation provisions took effect. Subpart S also stated that systems had to be loaded to 80 mobiles per channel before additional channels could be obtained.

33. The *Report and Order* unified loading standards for licensees of trunked systems above 800 MHz, requiring them to load their systems to 70 mobiles per channel to retain their channels and to be eligible to obtain additional channels. We also modified Section 90.631(d) of our Rules to relax loading standards for trunked systems in rural areas. Under the new standards, a rural licensee that has constructed a five channel system may obtain five additional channels without meeting any loading requirements. If the rural licensee wishes to expand beyond a ten channel system, however, modified loading standards apply. Paragraph 71 of the *Report and Order* contains a summary of our decision on this issue. As NABER points out, however, the language of our modified Rules and the language in paragraph 71 are not completely consistent because paragraph 71 gives the impression that rural systems may only expand to a system total of 20 channels. NABER Petition at 2. It was not our intent to limit the size of trunked rural systems. *See* 47 C.F.R. § 90.621(a)(1)(iii). Section 90.631(d), as amended in the *Report and Order*, accurately discusses loading in rural areas. The language of this Rule and not the discussion in Paragraph 71 is controlling.

34. NABER also asks that we clarify that a rural licensee who wishes to expand beyond a ten channel system is subject to loading standards, not merely construction standards. NABER Petition at 2-3. NABER's understanding of the Rules on this matter is correct. For the licensee of a ten channel rural system to obtain an additional five channels, the licensee would need to load five of its existing channels.[23] Another way to view this is that a system in a rural area is limited to no more than ten unloaded channels. Mere construction of a ten channel system would not be sufficient to entitle a licensee to additional channels.

IV. ERRATA

35. Since our release of the *Report and Order*, we have found some errors and omissions. In the paragraphs below, we discuss each error or omission and the specific correction or clarification required.

36. The *Report and Order* corrected a longstanding omission when it added a formal definition of the term "Specialized Mobile Radio System" to Section 90.7. The new definition correctly described SMR service as being available to all entities eligible for licensing under Part 90. It may give the false impression, however, that SMR licensees can offer radiolocation service to entities licensed under Part 90, Subpart F. Although Subpart F eligibles may use SMR service for traditional voice and data communications, SMR systems cannot offer radiolocation services. We now modify the definition of SMRS to reflect this point.

37. The text in paragraph 70 of the *Report and Order* is not complete due to a printing error. The first two sentences of paragraph 70 should read as follows: "We have, however, adjusted this requirement for those areas where demand for the 800 and 900 MHz spectrum is not as great as in the major markets. In the *Notice*, we solicited comments on a proposal originally put forth by ASNA urging

us to relax our loading requirements in rural areas so that existing trunked SMR systems in those areas could more easily expand."

38. The *Report and Order* removed Subpart M (Sections 90.350 through 90.390) from the Rules. We should also have removed references to Subpart M from other sections. We are, therefore, revising approximately 28 sections of the Rules to remove these references. We are also revising Section 90.175(f)(10) and (11) of the Rules, 47 C.F.R. § 90.175(f)(10) and (11) to indicate that these provisions apply to both the 800 and 900 MHz bands. Finally, we are revising Section 90.611(d) of the Rules, 47 C.F.R. § 90.611(d) to reflect that it applies only to SMR frequencies.

V. ORDERING CLAUSES

39. Accordingly, IT IS ORDERED, pursuant to 47 C.F.R. § 1.429(i), that the Joint Petition for Reconsideration filed on May 16, 1988 by the American Automobile Association, American Petroleum Institute, American Trucking Associations, Inc., Forest Industries Telecommunications, International Taxicab Association, Special Industrial Radio Service Association, Inc., and Utilities Telecommunications Council is DENIED.

40. IT IS FURTHER ORDERED that the Petition for Clarification filed by the National Association of Business and Educational Radio, Inc. on May 13, 1988, is GRANTED.

41. IT IS FURTHER ORDERED that pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), Part 90 of the Commission's Rules is AMENDED as set forth in the Appendix below, effective **February 21, 1989.**

42. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

1. Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

2. The authority citation for Part 90 continues to read as follows:

AUTHORITY Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303.

Part 90 - Private Land Mobile Radio Services

3. Section 90.7 is amended by revising the definition of Specialized Mobile Radio System to read as follows:

§ 90.7 Definitions

* * * * *

Specialized Mobile Radio System. A radio system in which licensees provide land mobile communications services (other than radiolocation services) in the 800 MHz and 900 MHz bands on a commercial basis to entities eligible to be licensed under this Part, federal government entities, and individuals.

* * * * *

4. Sections 90.17(c)(15), 90.19(e)(22), 90.21(c)(10), 90.23(c)(10), 90.25(c)(16), 90.53(b)(21), 90.63(d)(17), 90.65(c)(30), 90.67(c)(20), 90.69(c)(5), 90.71(c)(3), 90.73(d)(21), 90.75(c)(33), 90.79(d)(15), 90.81(d)(7), 90.89(c)(12), and 90.91(c)(13) are amended by deleting the words "Subparts M and S contain" and substituting the words "Subpart S contains."

5. Sections 90.93(c)(5) and 90.95(d)(10) are amended by deleting the reference to Subpart M and substituting a reference to Subpart S.

6. Section 90.119(g) is amended by deleting the reference to § 90.390 in the parenthetical clause.

7. Section 90.129 is amended by revising paragraph (i) to read as follows:

§ 90.129 Supplemental information to be routinely submitted with applications.

* * * * *

(i) Showings required in connection with the use of frequencies as specified in Subpart S.

* * * * *

8. Section 90.155 is revised by deleting in paragraph (a) the reference to § 90.366(d) and (g) and by deleting in paragraph (b) the reference to § 90.366.

9. Section 90.175 is amended by revising paragraphs (f)(7), (8), (10), and (11) to read as follows:

§ 90.175 Frequency Coordination Requirements

* * * * *

(f) * * *

(7) Reserved

(8) Applications for frequencies listed in the SMR tables contained in §§ 90.617 and 90.619.

(9) * * *

(10) Applications for mobile stations operating in the 470-512 MHz band or above 800 MHz if the frequency pair is assigned to a single system on an exclusive basis in the proposed area of operation.

(11) Applications for add-on base stations in multiple licensed systems operating in the 470-512 MHz band or above 800 MHz if the frequency pair is assigned to a single system on an exclusive basis.

* * * * *

10. Section 90.179 is amended by revising the introduction and adding 90.179(g) to read as follows:

§ 90.179 Shared use of radio stations.

Licensees of radio stations authorized under this rule part may share the use of their facilities. A station is shared when persons not licensed for the station control the station for their own purposes pursuant to the licensee's authorization. Shared use of a radio station may be either on a non-profit cost shared basis or on a for-profit private carrier basis. Shared use of an authorized station is subject to the following conditions and limitations:

* * * * *

(g) Above 800 MHz, shared use on a for-profit private carrier basis is permitted only by SMR and Private Carrier Paging licensees. *See* Subparts P and S of this Part.

11. Section 90.201 is revised by deleting the reference to Subpart M in the last sentence.

12. Section 90.437(d) is revised by deleting the reference to § 90.390.

13. Section 90.492 is revised to read as follows:

§ 90.492 One way paging operations in the 806-824/851-869 MHz and 896-901/935-940 MHz bands.

Paging operations are permitted in these bands only in accordance with §§ 90.645(e) and (f).

14. Section 90.611(d) is revised by inserting the words "for channels in the SMR category" in the first sentence. The revised section reads as follows:

§ 90.611 Processing of Applications.

* * * * *

(d) Applications for channels in the SMR category that can not be granted due to a lack of available channels in a particular area will be placed on a waiting list for that area. Waiting lists will consist of two groups. The first group will be comprised of applications from existing licensees who, in the area corresponding to the particular waiting list, operate trunked systems with 70 or more mobile units per channel. The second group will be comprised of applications to establish new systems or to obtain additional channels for conventional systems. Applications will be placed in the appropriate group according to filing dates, with the earliest date receiving the highest ranking. All applications in the first group will receive priority over any application in the second group regardless of filing date. When channels become available, the highest ranking application(s) will be granted based on the site specified and the Commission's mileage separation standards. Trunked systems that have had authorized channels canceled due to failure to meet the loading requirements in § 90.631 will not be permitted on the waiting list for a period of 6 months from the date of the issuance of the superseding license.

FOOTNOTES

[1] Report and Order, PR Docket No. 86-404, Amendment of Part 90, Subparts M and S of the Commission's Rules, 3 FCC Rcd 1838 (1988) (*Report and Order*).

[2] Licensing and use regulations for systems operating above 800 MHz are contained in Subpart S, except for private carrier paging operations in the 929-930 MHz band, which are governed under Subpart P. *See* 47 C.F.R. § 90.494.

[3] *See* Second Report and Order, Docket No. 18262, 46 FCC 2d 752 (1974) (designating 600 channels for private land mobile use and releasing 300 channels under Subpart M), *aff'd* Memorandum Opinion and Order, Docket No. 18262, 51 FCC 2d 945 (1975), *aff'd* National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976); Order, Docket 18262, 43 Fed. Reg. 35394 (August 9, 1978) (releasing 50 channels under Subpart M); Second Report and Order, PR Docket 79-191, 90 FCC 2d 1281 (1982) (releasing remaining 250 channels under Subpart S and transferring 150 conventional channels from Subpart M to Subpart S).

[4] Until the creation of Subpart S, Subpart M also governed the use of 150 conventional channels. These channels were tranferred to Subpart S in 1982. *See* Second Report and Order, PR Docket 79-191, 90 FCC 2d 1281 (1982).

[5] For a more detailed history of the channels above 800 MHz and of SMR services, *see Report and Order*, 3 FCC Rcd at 1838-39 and Notice of Proposed Rule Making, Subparts M and S, 1 FCC Rcd 809, 809-11 (1986).

[6] Notice of Proposed Rule Making, Subparts M and S, PR Docket 86-404, 1 FCC Rcd 809 (1986) (*Notice*); Erratum, 1 FCC Rcd 1225 (1986); Order, 2 FCC Rcd 4294 (1987) (extending termination date of Subpart M).

[7] Petition for Clarification of National Association of Business and Educational Radio, Inc., Subparts M and S, PR Docket 86-404 (May 13, 1988) (NABER Petition).

[8] The groups are the American Automobile Association, American Petroleum Institute, American Trucking Associations, Inc., Forest Industries Telecommunications, International Taxicab Association, Special Industrial Radio Association, Inc., and Utilities Telecommunications Council (Joint Petitioners). Joint Petition for Reconsideration, Subparts M and S, PR Docket 86-404 (May 16, 1988) (Joint Petition). Electrocom, Inc., an independent SMR operator, also filed a petition for reconsideration. Electrocom, Inc., Petition for Reconsideration, Subparts M and S, PR Docket No. 86-404 (September 27, 1988). Electrocom urges the Commission to accept this pleading, despite its being over four months late, because the proceeding is complex and because the Commission is currently evaluating other requests for reconsideration. We do not find these reasons sufficient to accept Electrocom's extremely untimely filing. *See* 47 C.F.R. § 1.46. Moreover, we find the pleading's arguments, which concern loading standards, to be without merit.

[9] Association of Maximum Service Telecasters, Statement of MST in Support of Joint Petition for Reconsideration, Subparts M and S, PR Docket 86-404, (June 20, 1988) (MST Comments);

Association of American Railroads, Comments in Support of Petition for Reconsideration, Subparts M and S, PR Docket 86-404 (June 9, 1988) (AAR Comments).

[10] American SMR Network Association, Inc., Opposition to Joint Petition for Reconsideration, Subparts M and S, PR Docket 86-404 (June 21, 1988) (ASNA Opposition).

[11] Reply to Opposition to Joint Petition for Reconsideration, Subparts M and S, PR Docket No. 86-404 (July 13, 1988) (Joint Reply). The Joint Petitioners also request that we accept their late-filed Joint Reply. In view of the fact that the Joint Petitioners were not served with a copy of ASNA's Opposition and did not become aware of that pleading until two weeks after ASNA filed it with the Commission, we will accept the late Joint Reply.

[12] Federal agencies, for example, could operate their own systems on federal government frequencies or use a common carrier service. Individuals could use a common carrier service or frequencies available to the general public *(e.g.,* citizens band or general mobile radio services).

[13] In pertinent part, the new Section 331(c)(1) of the Act provides that "private land mobile service shall include service provided by specialized mobile radio . . . regardless of whether such service is provided indiscriminately to eligible users on a commercial basis, except that a land station licensed in such service to multiple licensees or otherwise shared by authorized users . . . shall not be interconnected with a telephone exchange or interexchange service or facility for any purpose, except to the extent that (A) each user obtains interconnection directly from a duly authorized carrier; or (B) licensees jointly obtain such interconnection directly from a duly authorized carrier." 47 U.S.C. § 332(c)(1). *See also* Telocator Network of America v. FCC, 761 F.2d 763 (D.C. Cir. 1985).

[14] *See Report and Order*, 3 FCC Rcd at 1840.

[15] Of the six commenters addressing this issue, two argued that expanding eligibility was consistent with Congressional intent and four advanced arguments similar to those raised by the petitioners on reconsideration. *See Notice*, 1 FCC Rcd at 818.

[16] *Report and Order*, 3 FCC Rcd at 1840.

[17] *See* Paul Kelly d/b/a American Teltronix, 3 FCC Rcd 1091 (1988) *aff'd* 3 FCC Rcd 5347 (1988).

[18] *See* Paul Kelly d/b/a American Teltronix, 3 FCC Rcd 5347 (1988).

[19] *See* H.R. Conference Rep. No. 765, 97th Cong., 2d Sess. 54, *reprinted in* 1982 U. S. Code Cong. and Ad. News 2237. Congress stated its expectation that the Commission would "add, modify, and delete services as the need arises, consistent with the guidelines specified in subsection 331(a)." The Joint Petitioners interpret this language too narrowly. They argue that the Commission can expand *services* but not eligibility. In context, however, it is clear that Congress' use of the word "service" is synonymous with eligibility. In the sentence immediately preceding the statement that the Commission can expand services, Congress enumerated the various radio services (groups of eligibles) then existing. Conference Report at 54. The Joint Petitioners also rely on the case of Telocator Network of America v. FCC, 761 F.2d 763 (D.C. Cir 1985), to support their position. In that case the Court said that Congress allows the FCC to create new systems when faced with technological and policy advances. *Id.* at 768. The Court's statement of one circumstance in which the Commission might exercise its authority is in no way inconsistent with the Commission's expansion of eligibility and does not constitute a limitation on the Commission's discretion to amend its rules to meet the needs of a changing communications service environment.

[20] Given these conclusions, we reject MST's suggestion that we authorize SMR use by the federal government and individuals only on a case-by-case basis.

[21] As noted in para. 17, *supra.*, although in most areas these 200 trunked channels are already assigned, the 200 channels may help to forestall intercategory sharing in non-urban areas.

[22] The Joint Petitioners' suggestion that non-SMRs should be licensed subject to the same rules governing SMR systems does not differ significantly from the intercategory sharing procedures already in place. Under our intercategory sharing rules, a licensee is subject to the rules governing the frequencies for which it is licensed, even if those rules differ from those that would have applied if it had been licensed in its own category. 47 C.F.R. § 90.621 (g)(5).

[23] With loading requirements of 70 mobiles per channel and the requirement to load five channels, the rural licensee would need 350 mobiles on its system to expand from a ten channel system to a fifteen channel system. For each additional five channels that the rural licensee wants to add, it would need an additional 350 mobiles units on its existing channels.

STATEMENT OF COMMISSIONER JAMES H. QUELLO DISSENTING IN PART

Re: Amendment of Part 90, Subparts M and S of the Commission's Rules (PR Docket No. 86-404).

After reviewing the Petitions for Reconsideration in this proceeding, I am convinced that expanding SMR eligibility to allow federal government agencies and individuals to be end-users is poor public policy. Therefore, I am dissenting to that aspect of the Memorandum, Opinion and Order reaffirming the Commission's earlier action that expanded SMR eligibility to include federal agencies and individuals. As I have stated previously in this proceeding, the majority is now approving what the Commission previously rejected to do on the basis that such action would increase the costs of existing services.[1]

The majority would have the public believe that by expanding end-user eligibility in the SMR service we would be making new communication options available to these two groups. This is not so. Under the previous Part 90, Subparts M and S rules, individuals and government agencies could have sought waivers of the rules to be eligible end users.

The majority argues that by expanding eligibility of end users to include government agencies and individuals, the Commission would encourage greater use of SMR frequencies in remote areas. I have no problem with amending our rules to promote use of spectrum in remote areas, however, the amendments reaffirmed by the majority are applicable in all areas, rural and urban. Unfortunately, it is in the urban areas where the demand for spectrum is the greatest and the amendment to Part 90, Subparts M and S will exasperate an already difficult situation.

Finally, as I said before, I believe the Commission is seriously undermining the private carrier status of this service by expanding the end-user eligibility categories. The majority would prefer to focus the argument on the issue of resale rather than the issue of eligibility. As the majority states, Congress did grant the Commission authority to "add, modify, and delete services as the need

arises." (*See*, Section 331(a) of the Act) The majority, however, is taking great liberty in redefining eligibles to allow everyone except foreign governments or their representatives to become Part 90, Subparts M and S eligibiles. I believe such action is inconsistent with the intent of Congress.

Throughout this proceeding I have been able to demonstrate inconsistent public policy decisions. It is important to recognize that these decisions may have ramifications on land mobile services' ability to demonstrate need for additional spectrum.

FOOTNOTE FOR STATEMENT

[1] *See*, Concurring Statement of Commissioner James H. Quello, *Report and Order*, PR Docket No. 86-404, 3 FCC Rcd 1856, 1858 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

EAST TEXAS TELEVISION NETWORK, INC. File No. BMPCT-861231KF

For Extension of Time to Construct
Station KLNL(TV), Nacogdoches, Texas

ORDER

Adopted: December 12, 1988; Released: January 4, 1989

By the Commission:

1. The Commission has before it for consideration a petition for reconsideration filed April 28, 1988, by East Texas Television Network, Inc., (East Texas), former permittee of Station KLNL(TV), Nacogdoches, Texas. The petitioner seeks reversal of the Commission's action of March 11, 1988 (*East Texas Television Network, Inc.*, 3 FCC Rcd 1783 (1988)), denying review of a staff action cancelling the construction permit for the station.

2. Section 1.106(b)(2) of the Commission's Rules provides:

> Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances is present:
>
> (i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters;
>
> (ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

The only circumstance which has changed since our action of March 11, 1988, is that the petitioner now seeks the reinstatement only of the Nacogdoches construction permit and no longer pursues the authorizations for Station KLPH-TV, Paris, Texas, and Station KLDS(TV), Denison, Texas. In effect, petitioner is now simply informing us that it has abandoned its pursuit of the Paris and Denison permits; nothing else has changed. This decision by the former permittee in no way affects the basis for our denial of review. The Commission need not consider again matters which have already been considered and decided. *The Spartan Radiocasting Co.*, 22 FCC 2d 920 (1970), and the cases there cited. Further, the petitioner has not alleged that previously unknown facts have recently come to its attention. Finally, petitioner says that, if the Commission disagrees with its assessment of the record, Section 73.3534 of the Rules, which governs extensions of time to construct, should be waived. Petitioner has offered no reasons, sufficient, if true, to warrant a waiver of the rule. *U. S. v. Storer Broadcasting*, 351 U.S. 192 (1956).

3. Accordingly, IT IS ORDERED, That, for the reasons stated, East Texas' petition for reconsideration IS DISMISSED, and the request for waiver of Section 73.3534 of the Commission's Rules IS DENIED.

4. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, shall send a copy of this Order to East Texas by Certified Mail-Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI INTERNATIONAL, INC. File No. CSG-88-085-P/L

Application for authority to construct and operate an international multipurpose earth station facility at Andover, Maine.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: December 21, 1988; Released: January 4, 1989

By the Chief, International Facilities Division:

1. On August 10, 1988, MCI International, Inc. (MCI) filed an application requesting authority under Sections 304, 308, 309, and 319 of the Communications Act of 1934, as amended, and Sections 102(c)(2), 201(c)(4), 201(c)(6), 201(c)(7), 201(c)(9) and 210(c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate an international multipurpose INTELSAT Revised Standard-A earth station facility at Andover, Maine, to communicate with INTELSAT Atlantic Ocean Region (AOR) satellites for the provision of international telecommunications services. The application was placed on public notice August 24, 1988. No comments were received.

2. The proposed multipurpose earth station at Andover, Maine, will consist of a 21.0-meter antenna meeting INTELSAT Revised Standard-A technical parameters. The earth station will operate with INTELSAT AOR satellites in the 5925 - 6425 MHz transmitting frequency band and the 3700 - 4200 MHz receiving frequency band and will possess Frequency Division Multiplex/ Frequency Modulation (FDM/FM) and Intermediate Data Rate (IDR) capabilities, as well as the ability to provide other international telecommunications services. MCI states that the station design will permit operation with any existing or planned INTELSAT satellite serving the AOR. Initially, it intends to utilize the facility primarily for the provision of switched voice services. It plans to offer additional telecommunications services over the multipurpose station in the future. MCI estimates the multipurpose earth station will require a capital expenditure of approximately $3,585,000.

3. In its Report and Order in the *Earth Station Ownership Proceeding*, CC Docket No. 82-540, the Commission established a more open and flexible earth station policy which allowed entities other than the Earth Station Ownership Committee (ESOC) to own and operate international earth stations that access the INTELSAT system. The Order permitted the joint carrier[1] owners of ESOC earth stations to decide among themselves the future of ESOC. The Commission also concluded that when reviewing applications for these international earth stations, it would distinguish between earth stations dedicated to providing IBS and/or television services and multipurpose stations. IBS and/or television earth stations, the Commission found, do not have the same potential for revenue diversion and significant impact on system efficiency as multipurpose earth stations. Consequently, the Commission concluded that it would consider only the minimal legal, financial and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, as amended, when reviewing applications for IBS and/or television earth stations. Absent special problems, the Commission stated that it would treat these applications as routine and process them expeditiously.

4. With respect to multipurpose stations, the Commission stated that it would continue close scrutiny of applications for construction and operation of these facilities since they tend to raise more complex economic, technical and operational issues that may affect the variety, quality and price of service offered to users. In determining whether the grant of an application for a multipurpose earth station will serve the public interest, the Commission indicated it would conduct an analysis by balancing the possible benefits (*e.g.*, shorter terrestrial hauls, increased user options, lower charges to users, and increased customer base for INTELSAT services) against the possible detriments (*e.g.*, reduced technical efficiency, harmful revenue diversion, service deterioration and higher charges to users) which a particular application may present.[2] However, with the dissolution of ESOC earth station ownership arrangements and the transition to a competitive environment, the issue of harmful revenue diversion from existing ESOC earth stations is no longer a concern. More recently, the Commission has begun to focus on the quality and continuity of service to users and the availability of access to authorized carriers. [3]

5. We find that MCI has the necessary legal, technical and financial qualifications to construct and operate the proposed multipurpose earth station. MCI is a common carrier pursuant to Section 214 of the Communications Act of 1934, as amended. The proposed earth station conforms with INTELSAT performance criteria for Revised Standard-A earth stations. MCI has completed the necessary frequency coordination.

6. MCI is confident that the services provided through the multipurpose station will be technically efficient and of high quality. In addition, the proposed facility will help increase international service options available to users, contribute to the development of effective international competition and will assist in expanding the customer base for INTELSAT services. In light of these circumstances, we conclude that grant of the instant application for MCI to construct and operate the proposed INTELSAT Revised Standard-A multipurpose earth station at Andover, Maine, will serve the public interest.

7. Accordingly, IT IS ORDERED, pursuant to Sections 304, 308, 309 and 319 of the Communications Act of 1934, as amended, and Section 102(c)(2), 201(c)(4), 201(c)(6), 201(c)(7), 201(c)(9) and 210(c)(7) of the Communications Satellite Act of 1962, as amended, that application File No. CSG-88-085-P/L IS GRANTED; and MCI is authorized to construct and operate the proposed INTELSAT Revised Standard-A multipurpose earth station with one 21.0-meter antenna at Andover, Maine, for

the provision of international telecommunications services, initially between the United States and the United Kingdom, Bermuda, the Bahamas, Barbados, Israel, the Dominican Republic, Trinidad, the Netherlands Antilles, and Tobago.[4]

8. IT IS FURTHER ORDERED that before completion of equipment installation and facility activation, the applicant shall provide the Commission with a summary of equipment which was actually installed.

9. The Commission retains jurisdiction over this matter to ensure that all present and future authorized carriers have nondiscriminatory use of, and equitable access to, the communications satellite system and earth stations.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order. (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Earth Station Ownership, 100 FCC 2d 250 (1984).

[2] *Id.* at 284.

[3] *See* American Telephone & Telegraph Company, 2 FCC Rcd 6635 (1987).

[4] This authorization is not to be construed as permitting the provision of any service between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

EXECUTIVE TELECARD LTD. File No. I-T-C-89-020

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 21, 1988; Released: January 4, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on October 24, 1988, by Executive Telecard Ltd. (ETC), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone, and telex services of existing common carriers to provide international switched voice and telex service between the U.S. and various overseas points. The application was placed on public notice on November 9, 1988. No comments were received.

2. The applicant is a start-up company which is a wholly-owned subsidiary of International 800 Telecom Co., which is authorized to provide international resale service. ETC now proposes to resell international switched voice and telex services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by ETC.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-89-020 IS GRANTED, and ETC is authorized to:

a. provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2, between the United States and the overseas points listed in those tariffs.

b. provide international telex service by the resale of the international telex service set forth in ITT World Communications Inc.'s Tariff F.C.C. No. 12 between the U.S. and the points listed in that tariff.[3]

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1987).

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

[3] Pursuant to a transfer of control, ITT World Communications Inc., is now Western Union World Communications Inc. *See* 2 FCC Rcd 6063 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

VICTORY MEDIA, INC. — **MM DOCKET NO. 84-1033** File No. BPCT-840711KF

JOHNSON BROADCASTING, INC. — **MM DOCKET NO. 84-1034** File No. BPCT-840711KI

For Construction Permit for a New Television Station
Katy, Texas

ORDER

Adopted: December 22, 1988; Released: January 4, 1989

By the Review Board: MARINO (Chairman), and ESBENSEN.

1. On December 20, 1988, the two applicants in this proceeding filed a Joint Request for Approval of Agreement which was supplemented on December 22, 1988. The Review Board will hereby approve this joint request which complies with the requirements of Section 73.3525 of the Commission's Rules, 47 CFR 73.3525.

2. This case was remanded to the Board for further action in *Victory Media Inc.*, 3 FCC Rcd 2073 (1988). The parties have now decided to stop litigating and to settle the case. Victory Media, Inc. has agreed to dismiss its application and support the grant of Johnson Broadcasting, Inc., in return for monetary consideration.

3. As required by Section 73.3525 the two applicants have submitted declarations under penalty of perjury stating that their applications were not filed for the purpose of entering into a settlement agreement. *See* 47 U.S.C. 311(c)(3)(B). They have also indicated that the public interest will be served by approval of the agreement which will eliminate the need for further litigation and expedite the institution of new television service in Katy, Texas.

4. ACCORDINGLY, IT IS ORDERED, That the joint request for approval of agreement filed December 20, 1988, IS GRANTED; that the settlement agreement IS APPROVED; that the application of Victory Media, Inc. IS DISMISSED; and that the application of Johnson Broadcasting Inc., file No. BPCT-840711KI, IS GRANTED.

5. IT IS FURTHER ORDERED, That the following pleadings ARE DISMISSED: Petition to enlarge issues against Victory Media filed May 19, 1988; Petition to reopen the record filed by Victory Media on June 13, 1988; Motion to hold in Abeyance filed by Johnson Broadcasting on June 16, 1988; Motion for leave to file Supplement to petition to reopen the record filed by Victory Media on July 29, 1988; Opposition and Motion to Strike Victory Media's supplement to petition to reopen the record filed by Johnson Broadcasting on August 12, 1988.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-162

In re Applications of

WADE AXELL File No. BPCT-870327KK

For Construction Permit
for a New Television Station
on Channel 51,
Merced, California

Appearances

Robert Allen, Esquire, on behalf of Wade Axell, and *Norman Goldstein, Esquire*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

Issued: December 21, 1988; Released: January 5, 1989

PRELIMINARY STATEMENT

1. This proceeding was designated for hearing by *Hearing Designation Order*, DA 88-441, released April 14, 1988. It originally involved the mutually exclusive applications of Media Investment Corporation (Media) and Wade Axell (Axell) for a construction permit for a new television station to operate on Channel 51 at Merced, California. By *Order*, FCC 88M-1723, released June 3, 1988, the Presiding Judge dismissed the application of Media Investment Corporation for failure to prosecute, pursuant to the provisions of Section 1.221(c) of the Commission's rules. The dismissal of the application of Media mooted an environmental issue specified against that applicant as well as the comparative issue. Thus, the sole remaining issue is the following air hazard issue specified in the Designation Order against Wade Axell:

> To determine with respect to Axell whether there is a reasonable possibility that the tower height and location proposed by Axell would constitute a hazard to air navigation.

2. Presently under consideration is a "Motion for Deletion of Issue and Grant of Application" filed by Wade Axell on November 17, 1988. The Mass Media Bureau has advised the office of the Presiding Judge that it interposes no objection to the grant of the Axell application.

FINDINGS OF FACT

3. On November 2, 1988, the Federal Aviation Administration (FAA) issued a "Determination of No Hazard to Air Navigation" regarding Axell's proposal.[1] This determination is contained in Aeronautical Study No. 88-AWP-889-OE and is attached to Axell's "Motion for Deletion of Issue and Grant of Application."[2] The "Determination of No Hazard to Air Navigation" regarding Axell's proposal became final on December 12, 1988.

ULTIMATE FINDINGS AND CONCLUSIONS

4. The issuance by the FAA of the "Determination of No Hazard to Air Navigation" regarding Axell's proposal resolves the air hazard issue specified in the Designation Order. In this connection, there is no longer any material question of fact requiring a hearing. Thus, Wade Axell is entitled to Summary Decision on the air hazard issue pursuant to Section 1.251 of the Commission's rules.

Accordingly, IT IS ORDERED that the air hazard issue specified against Wade Axell IS RESOLVED in favor of the applicant;

IT IS FURTHER ORDERED that the application of Wade Axell (BPCT-870327KK) for a construction permit for a new commercial television station to operate on Channel 51 at Merced, California, IS GRANTED.[3]

FEDERAL COMMUNICATIONS COMMISSION

Joseph Stirmer
Administrative Law Judge

FOOTNOTES

[1] Axell filed a "Petition for Leave to Amend" to amend to specify a new transmitter site in order to meet the air hazard issue. This amendment was accepted by *Order* of the Presiding Judge, FCC 88M-4336, released December 21, 1988. The FAA issued the "Determination of No Hazard to Air Navigation" regarding this site, and it is on this basis that the air hazard issue is being resolved in favor of Axell.

[2] The Presiding Judge is treating Axell's motion as a motion for summary decision. Because the issue was not specified on the basis of a mistake of fact, there is no reason to delete the issue. Rather, the issue must be resolved on the merits.

[3] In the event that exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release, pursuant to 48 C.F.R. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-510

In re Applications of

RAMON RODRIGUEZ, *et al.*, d/b/a RAMON RODRIGUEZ & ASSOCIATES
Lajas, Puerto Rico — File No. BPH-821208AA

DAVID ORTIZ RADIO CORPORATION
Lajas, Puerto Rico — File No. BPH-830722AL

For Construction Permit
for New FM Station

Appearance

Christopher D. Imlay and *Julian P. Freret* on behalf of Ramon Rodriguez, *et al.*, d/b/a Ramon Rodriguez and Associates, Inc.; *Vincent J. Curtis, Jr., Robert A. DePont* and *Garrison Klueck* on behalf of David Ortiz Radio Corporation; and *Robert Zauner* on behalf of the Mass Media Bureau.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
JOHN M. FRYSIAK

Issued: December 21, 1988; Released: January 5, 1989

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications for authority to construct and operate a new FM broadcast station on Channel 279B at Lajas, Puerto Rico of the remaining two of the four applicants designated for hearing. *See Hearing Designation Order*, DA 86-445, released January 26, 1987; *Memorandum Opinion and Order*, FCC 87-393, released January 28, 1988.[1] The issues to be resolved are:

> To determine which of the proposals would, on a comparative basis, best serve the public interest; and
>
> To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if any.

2. By *Memorandum Opinion and Order*, FCC 88M-436, released February 18, 1988, the Presiding Judge enlarged the issues to include the following issue against Ramon Rodriguez & Associates, Inc. (Rodriguez):

> To determine whether [Rodriguez] misrepresented to the Commission by proposing an antenna-transmitter site without having made inquiry as to its availability and/or without reasonable assurance of its availability.

By *Order*, FCC 88M-2218, released July 13, 1988, the Presiding Judge found that Rodriguez had not intended to deceive the Commission in specifying its original transmitter site, and accordingly, granted Rodriguez's *Motion for Partial Summary Decision*, filed June 15, 1988, and resolved the issue in its favor.

3. An initial prehearing conference was held on March 31, 1987. Additional conferences were held on May 29, 1987, February 10, 1988 and March 23, 1988. The hearing was held on July 12, 1988 and July 13, 1988. The evidentiary record in the case was closed July 13, 1988 (Tr. 467).

FINDINGS OF FACT

Ramon Rodriguez and Associates, Inc.

4. Rodriguez is a stock corporation, incorporated under the laws of the Commonwealth of Puerto Rico (Rodriguez Ex. 1, p. 1). The present ownership structure of Rodriguez is as follows:

Principal	Position	Equity Interest
Ramon Rodriguez	President	3,000 shares
Guzman	Director	50 percent equity
Ruth Hernandez	Vice President	2,700 shares
	Director	45 percent equity
Belen Rodriguez	Secretary	120 shares
	Director	2 percent equity
Ramon A. Rodriguez	Treasurer	60 shares
		1 percent equity
Juan Carlos Rodriguez	None	60 shares
		1 percent equity
Marisol Rodriguez	None	60 shares
		1 percent equity

The corporation is authorized to issue 6,000 shares of common voting stock (*Id.*).

5. The corporation, which was originally a partnership, was formed as a result of a family discussion, which included the Rodriguez family and their close friend, Ruth Hernandez (Tr. 97-98, 124-25, 162, 179). Belen and Ramon Rodriguez are husband and wife; Ramon A., Juan Carlos and Marisol Rodriguez are their children. Ruth Hernandez's husband was at the initial organizational meeting, but he decided not to participate in the applicant because of his political obligations (Tr. 98, 100, 124, 133-34). He has not attended any further meetings (Tr. 191). Although Ramon Rodriguez Guzman retained the attorneys and engineers, and located the various transmitter sites, the authority to do so was delegated to him by the corporation (Tr. 108, 142). Every decision made by the corporation has been a group decision, with input from each principal (Tr. 94, 97-98, 107, 118-21, 124-25, 131, 141-42, 153, 162, 164, 167). Rodriguez has no other broadcast interests (Rodriguez Ex. 1, p. 1). Nor do any of its principals (Rodriguez Ex. 2, p. 1).

6. Each of the six stockholders will work in excess of 40 hours per week in the management of the proposed station (Rodriguez Ex. 1, p. 2). Ramon Rodriguez Guzman will be General Manager and Program Director; Ruth

Hernandez will be Traffic Manager; Belen Rodriguez, Sales Manager and Marketing Director; Ramon A. Rodriguez, Operations Director; Juan Carlos Rodriguez, News Director; and Marisol Rodriguez, Director of Public Service Broadcasting (*Id.*). Mr Rodriguez Guzman will be responsible for overseeing all aspects of the station's operations, including marketing, sales, programming, engineering, equipment procurement and finances. As Program Director, he will oversee the establishment of the station's format, as well as supervise the programming to fit that format. He will assure full compliance with all Federal Communications Commission regulations, and other applicable rules. Mr. Rodriguez Guzman will also develop a positive relationship with the local community and its civic leaders. Together with the other managers, he will hire and fire staff, establish department goals and approve budgets (Rodriguez Ex. 2, p. 2).

7. Ruth Hernandez, as Traffic Manager, will be responsible for the scheduling of all programs, public service announcements, and news. She will prepare the daily program logs and supervise all other program scheduling. She will consistently consult with the General Manager in order to discuss goals for the station's programming, and to insure that the format consistently promotes those goals. Mrs. Hernandez will continuously consult with the Director of News and of Public Service Broadcasting to insure the station's program schedule meets the needs of the community (Rodriguez Ex. 3, p. 3).

8. Belen Rodriguez will serve as Sales Manager and Marketing Director for the proposed station. She will handle all business planning and market development. Mrs. Rodriguez will be responsible for the establishment and promotion of sales strategies, and for supervising the sales department staff. She will also actively promote the station to the many advertisers in the community, and solicit sponsors for various program. In addition, she will regularly consult with the General Manager regarding advertising prices, the size of the sales department, as well as overall goals and policies. When necessary, Mrs. Rodriguez will take advantage of her background in sales and make direct calls on clients in addition to her full-time management duties (Rodriguez Ex. 4, p. 2).

9. The proposed Operations Director, Ramon A. Rodriguez, will be responsible for the coordination of personnel engaged in program production and preparation. He will also coordinate all remote broadcasts. Mr. Rodriguez will examine program expenditures and insure efficient production of programs. He will regularly consult with the other managers to coordinate programming needs. Mr. Rodriguez will also supervise the establishment of an efficient production of programs. He will regularly consult with the other managers to coordinate programming needs. Mr. Rodriguez will also supervise the establishment of an efficient office atmosphere (Rodriguez Ex. 5, p. 2).

10. Juan Carlos Rodriguez, the station's News Director, will coordinate and direct all activities of the news department and its staff (Tr. 148). His responsibilities will also include monitoring developing stories, reviewing edited copy, and approving program content. He will direct the news gathering effort and news delivery staff of the station. In addition, Mr. Rodriguez will work with the Director of Public Affairs Broadcasting to promote public awareness of the station's news programs and policies. He will also work to maintain continuous liaison with the Lajas community in order to ascertain and air news of special significance to the people (Rodriguez Ex. 6, p. 7).

11. Marisol Rodriguez will serve as the proposed station's Director of Public Service Broadcasting. She will actively promote public awareness of the station, its programs and policies in the Lajas area. She will plan and coordinate public service programs concerning education, religion, civic and governmental affairs, and other areas of concern within the community. Ms. Rodriguez will maintain contacts with government and educational organizations, establish positive relationships with area leaders, attend meetings and address groups to inform them of the possible uses of the station and listen to their concerns. It will be her responsibility to ascertain local needs and determine community problems which can be addressed by public programs. Ms. Rodriguez will also supervise and direct the staff of the Public Service Department (Rodriguez Ex. 7, p. 2; Tr. 122).

12. Ramon Rodriguez Guzman, President, Director and 50 percent stockholder of Rodriguez, presently resides in Levittown, Puerto Rico, which is not within the proposed 1 mV/m service contour of the Rodriguez station (Rodriguez Ex. 2, p. 1). Mr. Rodriguez Guzman was born in 1938 and was raised in Mayaguez, Puerto Rico, which is within the proposed 1 mV/m service contour (*Id.* p. 3). Upon grant of Rodriguez's application, Mr. Rodriguez Guzman will move to Lajas and establish permanent residency (*Id.*). He presently, with his wife, Belen Rodriguez, owns and operates a record production and manufacturing business and a music store. He is also part of the musical group Los Andinos, with his sons, Ramon A. and Juan Carlos Rodriguez (*Id.* p. 1). Upon grant of the Rodriguez application, Mr. Rodriguez Guzman will sell his businesses (Tr. 81) and discontinue performances with Los Andinos (Rodriguez Ex. 2, p. 1).

13. Mr. Rodriguez Guzman began his broadcast career in 1955, as an intern at WAEL, Mayaguez, Puerto Rico. He began working professionally for WAEL, in 1957, while still in high school. He has also worked as a radio announcer and control room operator at WPRA, Mayaguez (1958); WNIK, Arecibo (1959-1961); WMIA, Arecibo (1961); WMNT, Manati (1962); and WAPA, San Juan (1963-1972). He also served as Director of Programming and jingles production at WBQN, Barceloneta (1974-1979). He has created and hosted variety and talk shows at several stations, including "One Romance Each Monday" (WAEL), "Oriola's Today Top Hits" (WNIK), "The Saturday Show" (WMNT), "Una Hora Y Mil Recuerdas" (WVOZ), and "Los Andinos Y sus Amigos" (WEGA) (*Id.* pp. 3-4).

14. Mr. Rodriguez Guzman has been involved in several fund-raising Activities, through the Lions Club or other local organizations, at Lajas, Mayaguez, San German, Cabo Rojo, and other communities within the 1 mV/m contour of the proposed station (*Id.* p. 3).

15. Ruth Hernandez, Vice President, Director and 45 percent stockholder, presently resides in Sarasota, Florida, with her husband. She is an Hispanic female. She and her husband are co-owners of National Ceramics of Sarasota, Inc. and of Beauty Floors, Inc. (Rodriguez Ex. 3, p. 1). Upon grant of the Rodriguez application, they will sell their business in Sarasota (*Id.*, Tr. 139). Once the application is granted, Mrs. Hernandez will move with her family into her sister's vacation home in Boqueron, Puerto Rico, which is within the proposed 1 mV/m contour of the

station, until she can relocate to within the city limits of Lajas and establish permanent residence (Rodriguez Ex. 3, p. 2).

16. Belen Rodriguez, wife of Ramon Rodriguez Guzman, is Secretary, Director and 2 percent stockholder of Rodriguez. She is an Hispanic female. She presently owns and operates, with her husband, a music store and record production and manufacturing business. At the music store her duties include retail sales, and overall management (Rodriguez Ex. 4, p. 1). Upon grant of the Lajas application, Mrs. Rodriguez plans to sell the businesses; there is already someone interested in the record store (Tr. 81). Mrs. Rodriguez will relocate to Lajas immediately upon grant of the Rodriguez application (Rodriguez Ex. 4, 2).

17. Ramon A. Rodriguez, Treasurer and 1 percent stockholder of Rodriguez, is the oldest son of Ramon and Belen Rodriguez. He is Hispanic. He has worked as a music teacher, music director and salesman. Mr. Rodriguez is part of the singing group, with his father and brother, Los Andinos. Upon grant of the Rodriguez application, he will discontinue performances with Los Andinos and devote all of his time to the radio station (Rodriguez Ex. 5, p. 1). Mr. Rodriguez will move to Lajas and establish permanent residence there should the Rodriguez application be granted (*Id.* p. 2).

18. Juan Carlos Rodriguez is the son of Ramon and Belen Rodriguez. He is an Hispanic male. He presently works at his parents' record production business, as well as performing with his father and brother as Los Andinos. Should Rodriguez's application be granted, he will discontinue these involvements so that he may work full time at the Lajas station (Rodriguez Ex. 6, p. 1). Mr. Rodriguez has worked as a radio announcer with his father at radio stations WEGA, Vega Baja, Puerto Rico and WVOZ, San Juan, Puerto Rico (*Id.* 3); he was not paid for this work (Tr. 153). Mr. Rodriguez will move to Lajas once the Rodriguez application is granted (Rodriguez Ex. 6, p. 3).

19. Marisol Rodriguez, 1 percent stockholder of Rodriguez, is the youngest child of Ramon and Belen Rodriguez. She was not part of the original application, as she was still a minor at the time it was filed (Tr. 119). However, she has always been involved in the meetings of the partnership and, later, of the corporation (Tr. 118-19). She is an Hispanic female. Ms. Rodriguez is presently studying Business Administration at Interamerican University and will graduate in December 1988 (Rodriguez Ex. 7, p. 1). In addition, she works at her parents' record store. Upon grant of the Lajas application, Ms. Rodriguez will cease work at the record store; should the application be granted prior to her graduation, she will transfer to the San German Campus of Interamerican University and continue as a night student (*Id.*). Ms. Rodriguez will move to and establish permanent residence in Lajas should Rodriguez's application be granted (*Id.* p. 2).

20. Rodriguez proposes to install an auxiliary power generator at the transmitter site and at the studio in order to maintain operation in the event of a commercial power outage (Rodriguez Ex. 1, p. 3).

David Ortiz Radio Corporation

21. Ortiz is a corporation organized under the laws of the Commonwealth of Puerto Rico (Ortiz Ex. 1, p. 2). Its ongoing activities include the operation of standard broadcast station WEKO, Cabo Rojo, Puerto Rico,[2] of which Ortiz is the licensee, and the prosecution of its application for a new FM station at Lajas (*Id.*). Its officers, directors and ownership are as follows:

Name	Office	Director	Ownership
David Ortiz-Cintrol	President	Yes	51 percent (VS)
Inocencia Aviles de Ortiz	Secretary/ Treasurer	Yes	49 percent (VS)

At the time the application was filed, there were three stockholders: Mr. and Mrs. Ortiz, and their daughter, Maria Ortiz-Aviles. Ms. Ortiz sold her shares to her father in 1984. David Ortiz paid his daughter for her 45 percent stock interest in Ortiz (Tr. 401). David Ortiz then held 95 percent of the stock, and his wife held 5 percent (*Id.*). On July 30, 1985, (the "B" cut-off date), Ortiz filed an amendment to its application to indicate that David Ortiz held 51 percent and Inocencia Ortiz held 49 percent of the corporation's stock (Rodriguez Ex. 8, p. 4). Mr. Ortiz testified that he has not been paid for the stock and that Mrs. Ortiz is not obligated to pay for it at some future time (Tr. 460-61).

Diversification

22. Ortiz is the licensee of standard broadcast station WEKO, Cabo Rojo, which is within the proposed service area of the proposed Lajas FM station (Ortiz Ex. 1, 2; Ortiz Ex. 2, p. 4). Ortiz has no other media interests (Ortiz Ex. 1, p. 2). Apart from their interests in Ortiz, Mr. and Mrs. Ortiz do no have interests in any other medium of mass communications (Ortiz Ex. 2, p. 6; Ortiz Ex. 3, p. 4).

23. David Ortiz will serve as full-time General Manager of the Lajas FM station, devoting at least 40 hours per week to that position (Ortiz Ex. 2, p. 3). In order to effectuate his integration proposal, David Ortiz will, upon commencement of operations of the proposed station, curtail his current involvement at WEKO and will work only 20 hours per week at WEKO (*Id.*, Tr. 461). As General Manager of the proposed Lajas FM, Ortiz will oversee the construction and operations of the station (*Id.*). He will have ultimate authority for all decisions affecting the station, including long-range policy matters and significant financial decisions (*Id.*). The programming of the station will be under David Ortiz's supervision, as will the administrative, sales and promotional components (*Id.*). All major decisions in those areas will be made by Mr. Ortiz after consultation with appropriate station personnel (*Id.*). He will also be responsible for the implementation of the station's equal employment opportunity program (*Id.* pp. 3-4).

24. Mr. Ortiz is an Hispanic male (*Id.*). He has lived within the service area of the proposed Lajas station for most of his life, including the first 14 years in Cabo Rojo, which is within the service area of the proposed station and is approximately 10 miles from Lajas (*Id.*). Upon grant of the construction permit to Ortiz, he will maintain his residence in Cabo Rojo. Mr. Ortiz suffers from a permanent physical disability caused by infantile paralysis (or polio) (*Id.*). Mr. Ortiz has become a member of the Puerto Rico Governor's Committee for the Handicapped, and he actively participates in any activity related to birth defects and handicapped people (*Id.*).

25. David Ortiz has worked as a professional radio broadcaster all of his adult life (*Id.*, p. 4). His experience covers a period of more than 36 years (*Id.*). For the past 18 years, David Ortiz and his wife, Inocencia Aviles de Ortiz, have, through their corporation, David Ortiz Radio Corporation, owned and operated standard broadcast station WEKO (*Id.*). During his career, Mr. Ortiz has performed in virtually all positions involved in the operation of a radio station. Since 1959, his broadcast experience has been in management as a general manager and executive (*Id.*).

26. David Ortiz's radio career began in 1953 at WTIL in Mayaguez, Puerto Rico, as a radio announcer. Later that year, he moved to WORA, Mayaguez, as radio announcer and control room engineer. In 1954, he moved to New York to work at WHOM and WBNX, announcing and directing the news staff. In 1958, he began work at WNIK, Arecibo. He began as an announcer and sales assistant. He became General Manager. He worked on the construction and commencement of WNIK-FM, and later served as General Manager for both the AM and FM stations. He left WNIK in 1974. In 1970, he supervised construction of Ortiz's AM station, WEKO, of which he later became General Manager (*Id.*, pp. 4-5).

27. Mr. Ortiz has been a member of the Cabo Rojo chapter of the Rotary Club since 1987. He has also been a member of the American Cancer Society of the Western part of Puerto Rico for approximately 12 years. Mr. Ortiz was a founder and bulletin director of the Cabo Rojo Sertoma ("service to mankind") Club (1974-1978). From 1975 through 1981, he was a member of the Handicapped People's Club of Lajas. Mr. Ortiz organized two radio marathons for the handicapped, in 1975 and 1977, in Lajas and San German. In 1975, Mr. Ortiz founded the Antique Car Club, which works to raise funds for charities in Mayaguez, Aguadilla, San German, Hormigueros, and Lajas. In the mid-seventies he was on the planning committee for the Pineapple Festival of Lajas. During the same period of time, Mr. Ortiz helped to coordinate the inauguration of the new police station, served on the Cabo Rojo Mayor's Advisory Committee for Federal Plans, and was a member of the Cabo Rojo Jaycees (*Id.*, pp. 6-7). David Ortiz and/or his radio station have received several awards from local organizations for work in the community including the Police Departments from several surrounding communities, the Knights of Columbus, Rotary Club and several government agencies and offices (*Id.*, pp. 9-16). David Ortiz has also been involved in several activities island wide, including service on the Governor's Committee for the Handicapped since 1976, on the Puerto Rican state delegation as President for the President's Committee for the Handicap Family in 1977, and on the State Policy Advisory Committee (1975-1979) (*Id.*, pp. 6-7).

28. Inocencia Aviles de Ortiz proposes to be integrated into Ortiz's proposed station's operations as its full-time (at least 40 hours per week) Assistant General Manager/Operations Director (Ortiz Ex. 3, p. 2). In order to effectuate her proposal, she will, upon commencement of operations of the station, terminate her current employment at Station WEKO (*Id.*). In her capacity as Assistant General Manager/Operations Director, she will have supervisory responsibility over the scheduling of programming (*Id.*). She will also be involved in training personnel and will coordinate the scheduling of station personnel (*Id.*, pp. 2-3). She will assist the general manager with respect to the administration of station affairs and will have supervisory responsibility for payroll, office administration and collection of accounts receivable (*IdId.*). Finally, she will carry out the day-to-day duties of the General Manager during periods of his absence from the station (*Id.*).

29. Mrs. Ortiz is an Hispanic female (*Id.*, p. 2). She was born in 1937 in Cabo Rojo, Puerto Rico (*Id.*). For most of her life, she has lived within the service area of the propose station at Lajas (*Id.*). For the last 14 years, She has resided in Cabo Rojo, within the service area of the proposed station (*Id.*). Upon grant of the Ortiz application, she plans to maintain her residence in Cabo Rojo (*Id.*).

30. Inocencia Ortiz de Aviles has 14 years of broadcast experience, all of it at Station WEKO (*Id.*, p. 3). During her 14 years at WEKO, Mrs. Ortiz has performed a variety of jobs. She has supervised the preparation and maintenance of the WEKO programming logs (*Id.*). She hires and supervises the secretaries and support staff for the station (*Id.*). She creates the work schedules for the WEKO staff and also does the billings and collections for the station (*Id.*). In addition, she does some technical work such as recording audio feeds. She has in the past done some announcing (*Id.*).

31. Inocencia Ortiz de Aviles has also been involved in civic activities within the service area of the proposed Lajas station and in Lajas itself. In 1975, she and her husband assisted in the creation of a remote broadcast by WEKO of a "radio marathon" to aid the disabled in Lajas (*Id.*, p. 4). In 1977, Mrs. Ortiz toured with an antique car club on a trip throughout the service area of the proposed station as a means of collecting funds for charities (*Id.*). Mrs. Ortiz also has been an active member of the Cabo Rojo Catholic Church group, the Schoenstatt Family, since 1970 (*Id.*).

Auxiliary Power

32. Ortiz proposes to install auxiliary power generating equipment to ensure the proposed station's continued operation in the event of any emergency condition causing an interruption in the normal electrical power supply (Ortiz Ex. 4, p. 2).

Comparative Coverage

33. The applicants in this proceeding have submitted a joint engineering exhibit. There are eight aural services to the entire 1 mV/m service areas for the two proposed FM operations. The following table depicts the areas in square kilometers and the populations which each applicant would serve, as of the engineering proposals at the "B" cut-off date. [3] The population was based on the 1980 U.S. Census and the land area was determined by polar planimeter from an original map.

Applicant	Area	Population
Rodriguez (B" cut-off)	2,001.3 sq. km.	452,621
Rodriguez (5/88 amendment)	2,107.0 sq. km.	441,414
Ortiz (B" cut-off)	2,526.4 sq. km.	579,105
Ortiz (5/88 amendment)	2,893.0 sq. km.	623,082

(Joint Engineering Ex. pp. 6, 7, 10, 14, 16, 18).

CONCLUSIONS OF LAW

Ramon Rodriguez and Associates, Inc.

Diversification

34. Rodriguez has no other broadcast interest; nor does any of its principals.

Integration

35. Rodriguez will be credited with 100 percent quantitative integration credit because each of its six principals will participate full time in the day-to-day management and operation of its proposed station. Ortiz argues that Rodriguez should only be credited with the participation of Ramon Rodriguez because the application was conceived and totally dominated by him and that he will continue total domination of the station's operation because none of Rodriguez's other principals will have any managerial impact in the proposed operation. The record, however, reveals that every decision relative to the Rodriguez application has been made by the group working together and the likelihood is that Rodriguez will be run on the same basis in the future.

36. Ruth Hermandez's proposed position is Traffic Manager. Although the position of Traffic Manager is not listed in the Policy Statement (*Policy Statement on Comparative Broadcast Hearing*, 1 FCC 2d 393 (1965)) (*Policy Statment)* as a management position, the duties to be assigned to her (*see* Rodriguez Ex. 3, p. 2; Findings No. 7, *supra)* are clearly of a management level. Given her active participation in the application to date, her sizeable equity interest, and her intention upon the receipt of a grant to sell an ongoing business in Florida and to relocate to Puerto Rico, it is obvious that her input would continue in the management of the proposed station.

37. Belen Rodriguez is slated to be Sales Manager, a recognized managerial position and she will have all the responsibilities normally associated with that position. Ramon A. Rodriguez as Operations Director will coordinate all remote broadcasts. Additionally, he will examine program expenditures and will consult with the other managers to coordinate programming needs. Such duties are of a managerial level.

38. Juan Carlos Rodriguez is proposed as News Director. The position of News Director is recognized by the *Policy Statement, supra*. The prospective duties of Mr. J.C. Rodriguez indicate that he is to attend to everything that has to do with news in the news department. Marisol Rodriguez's proposed position as Director of Public Service Broadcasting is recognized in the *Policy Statment, supra*. *See Merrimack Valley Broadcasting, Inc.*, 52 RR 2d 1210 (Rev. Bd. 1982). It is intended that she will supervise and direct the staff of the Public Services Department.

39. Mr. Rodriguez Guzman's participation (50 percent equity interest) is enhanced by his intended future residence in the community of license and past broadcast experience. Ruth Hermandez's participation (45 percent equity) is enhanced by her intended future residence, and by her minority and female status. Belen Rodriguez's participation (2 percent equity) is enhanced by her intended future residence, and her minority and female status. Ramon A. Rodriguez's participation (1 percent equity) is enhanced by his intended future residence and his minority status. Jean Carlos Rodriguez's participation (1 percent equity) is enhanced by his intended future residence, his minority status and his past broadcast experience. Marisol Rodriguez's participation (1 percent equity) is enhanced by her intended future residence, her minority and female status.

40. Rodriguez also is entitled to a credit for its proposal to install an auxiliary power generator.

David Ortiz Radio Corporation

Diversification

41. Ortiz is the licensee of WEKO(AM), Cabo Rojo, Puerto Rico.[4] It does not propose to divest itself of this station in case of a grant. Diversification is a factor of primary significance to the Commission (*Policy Statement, supra*; *Snake River Valley Television, Inc.*, 20 RR 2d 644 (Rev. Bd. 1970); *KBBS, Inc.*, 52 RR 2d 185 (Rev. Bd. 1982); *Communities Properties, Inc.*, 52 RR 2d 981 (Rev. Bd. 1983); *Multiplex Communications, Inc.*, 54 RR 2d 733 (Rev. Bd. 1983)). Ortiz's ownership of a full-time radio station in the immediately adjacent community warrants a moderate to substantial diversification demerit. Ortiz argues that this negative factor should be substantially modified in light of the "inferior" status of AM broadcasting today. This argument, however, clearly goes to Commission policy which has not addressed this point and Commission policy may not be altered at this level. Rodriguez is entitled to a moderate to substantial preference on diversification because it would provide a new voice in the proposed service area whereas Ortiz would not.

Integration

42. Ortiz is credited with a 100 percent quantitative integration credit for the proposed participation of its principals David Ortiz and Inocencia Aviles de Ortiz. Qualitatively, David Ortiz's participation (51 percent equity) is enhanced by his past and future residence in the proposed service area, his civic participation, his minority status and his past broadcast experience. Ortiz also claims an integration enhancement credit for David Ortiz's status as a physically disabled person. However, Commission policy does not allow for any such enhancement. *See Paralyzed Veterans of America*, 59 RR 2d 1353, 1354 (1985); *Webster - Baker Broadcasting Co.*, 50 RR 2d 1142 (Rev. Bd. 1982). Inocencia Aviles de Ortiz's participation (49 percent equity) is qualitatively enhanced by her past and future residence in the proposed service area, her civic participation, her minority and female status and her past broadcast experience.

43. Ortiz also is entitled to a credit preference for its proposal to install auxiliary power.

Comparative Coverage

44. Neither of the applicants proposes to bring service to unserved or underserved area. The Commission has awarded only very slight preference in instances of coverage disparities in well served areas. *See Family Broadcasting Group*, 93 FCC 2d 771, 53 RR 2d 662 (Rev. Bd. 1983). In the instant case the difference between the two applicants in population served is 137,691 people and in area served is 525.1 square kilometers, both in favor of Ortiz. However, there are eight stations serving the proposed service area. Hence, Ortiz is only entitled to a very slight preference.

ULTIMATE CONCLUSIONS

45. Ortiz has received a moderate to substantial diversification demerit for the ownership of an AM radio station in the proposed service area. Under the Commission's integration criteria each applicant has received a 100 percent quantitative credit for its respective integration proposal. Qualitatively, the Ortiz proposal is superior based on the enhancement credits given to it for past residence in the proposed service area (100 percent versus 0 percent); civic participation (100 percent versus slight) and past broadcast experience (100 percent versus 51 percent). Additionally, Ortiz is entitled to a very slight preference for its greater comparative coverage. The combined weight of the enhancement credits given to Ortiz together with the comparative coverage preference does not outweigh the moderate to substantial demerit given to it under the diversification criteria. Rodriguez is deemed to be the winner. The public interest would be better served by a grant of its application.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application of Ramon Rodriguez, et al., d/b/a Ramon Rodriguez & Associates (File No. BPH-821208AA) IS GRANTED and the application of David Ortiz Radio Corporation (File No. BPH- 830722AL) IS DENIED.[5]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

FOOTNOTES

[1] The application of Westcom Corp. (formerly Gullermo A. Bonet and Hilda Acosta de Bonet d/b/a Bonet Associates) was dismissed at the applicant's request, by *Order*, FCC 88M-245, released February 5, 1988. The application of Carmen B. Rodriguez and Frederick Gauthier de Castro d/b/a FM Minority Broadcasting was dismissed, pursuant to a settlement agreement by *Memorandum Opinion and Order*, FCC 88M-1696, released June 2, 1988.

[2] Cabo Rojo is about 7 or 8 miles from Lajas (Tr.465).

[3] Although both applicants have recently amended their applications to specify new sites, those amendments were each accepted by the Presiding Judge (*Order*, FCC 88M-1904, released June 20, 1988; *Order*, FCC 88M-2175, released July 11, 1988) with the specification that no comparative advantage would be gained. The areas and populations listed in the Joint Exhibit represent those specified as of the "B" cut-off date in this proceeding (July 30, 1985).

[4] Rodriguez argues that Ortiz should be charged with the ownership of radio station WMIO(FM) in Cabo Rojo which is owned by the daughter of Ortiz's principals Mr. and Mrs. Ortiz. This argument is rejected because there is no Commission precedent as to filial attribution for diversification purposes.

[5] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-212

In the Matter of

Amendment of Part 2 of the
Commission's Rules Regarding
Equipment Authorization Procedures

REPORT AND ORDER

Adopted: December 15, 1988; Released: January 5, 1989

By the Commission:

INTRODUCTION

1. By this action, the Commission amends the equipment authorization requirements in Part 2 of its Rules. This action simplifies equipment identification and labeling standards, reduces application filing requirements, and improves the efficiency of the Commission's equipment sampling procedures.

BACKGROUND

2. As part of the Commission's equipment authorization process, all approved equipment must be identified with a label that includes an FCC Identifier (FCC ID).[1] The existing identification requirements were adopted in order to provide for a systematic method to identify equipment which has been approved by the Commission. The FCC ID consists of three elements: 1) grantee code; 2) manufacturer code; and 3) equipment number/product code.[2] In addition, the identification label must be formatted in a prescribed manner and must specify the country of origin if different from the United States. [3] Under the current rules a change in the FCC ID necessitates the filing of a new application for equipment authorization with the Commission regardless of the reason for the change. Also the change or addition of trade names under which an authorized device will be marketed requires the filing of a new application by the grantee of the equipment authorization.[4] The rules further provide that the Commission may, from time to time, request samples of equipment for which an equipment authorization has been granted.[5] These samples are tested for compliance with the Commission's technical standards. In addition, the equipment authorization rules require that the administrative data filed by the grantee in association with individual equipment authorizations be kept current.

3. In the *Notice of Proposed Rule Making* (*Notice*) in this proceeding, the Commission observed that as a consequence of the proliferation of electronic equipment and changes in manufacturing practices over the years, the present authorization program requirements appear to have become too complex and burdensome for both the grantees and the Commission.[6] In an effort to remedy these problems, we proposed to simplify the equipment identification rules and to eliminate unnecessary application filing requirements. Specifically, we proposed to modify the FCC ID, delete the requirement for a grantee to re-apply for an equipment authorization when trade names for a device are changed or added, and to relax the formatting standards for equipment authorization labels. We also proposed to strengthen the FCC equipment sampling program and to revise certain aspects of the administrative provisions of the equipment authorization rules. Comments were filed by 22 parties and reply comments were filed by 3 parties. A list of the parties filing comments and reply comments is contained in appendix A.

DISCUSSION

Identification

4. *Deletion of the manufacturer code.* In the *Notice*, we observed that where it was once common for a grantee to employ a single manufacturer to fabricate a product, it is now more common for a grantee to employ several different manufacturing sources and to change these sources frequently. This practice allows a grantee to obtain the best price for the manufacture of a given device, thereby enabling it to offer the device to consumers at a lower price. We also observed that the requirement to apply for a new authorization each time manufacturing sources are changed now appears to be burdensome for grantees and causes them delays in shifting production sources. We indicated that since the grantee is the party responsible for the technical compliance of marketed equipment, there appeared to be no regulatory need for identifying the manufacturer.

5. Most of the commenters support the deletion of the manufacturer's code from the FCC ID. However, some believe that by requiring the placement of the manufacturer code on a device, manufacturers will be more likely to produce equipment that complies with the Commission's technical standards. Other commenters believe that the Commission's enforcement program would be hindered by the inability to cross reference the manufacturer code in cases where a single manufacturer produces defective devices for multiple grantees or when trying to isolate an individual manufacturer of defective equipment where the grantee employs several manufacturers to fabricate the same device. Linear Corporation (Linear), in its comments suggests that the Commission not abandon the identification of manufacturers, but instead have the grantee uniquely mark devices to indicate the manufacturer. The Commission then could collect the information through a simple notification procedure. Linear believes that in many cases the grantee is in a poor position to control the quality of devices for which it has obtained equipment authorization and that the deletion of the manufacturer code will distance the manufacturer from the Commission's enforcement abilities.

6. We continue to believe that the manufacturer code requirements impose substantial burdens on grantees of equipment authorizations. We also are not persuaded by the statements of some commenters that display of manufacturer identification on devices is necessary to induce manufacturers to comply with our technical standards. Section 2.931 of our Rules states that the responsibility for the compliance of equipment marketed under an equipment authorization rests with the *grantee* of the au-

thorization. Thus, grantees are responsible for monitoring the equipment produced under contract by third party manufacturers for compliance with the rules. There has been no evidence presented in this proceeding to indicate this rule is not sufficient by itself to ensure that electronic equipment complies with the applicable technical standards or that the manufacturer code requirements serve to increase compliance in this regard.

7. Cross reference of the manufacturer code to identify potential non-compliant devices produced by the same manufacturer may of course be possible. However, this procedure has not generally been necessary for the accomplishment of our enforcement efforts. If necessary, the identity of the manufacturer of a particular device could be obtained from the grantee through the unit's serial number. Thus we see no need to require grantees to separately mark equipment with the grantee's own internal code to identify the manufacturer as suggested by Linear. Furthermore, our rules provide that in the case of non-compliant equipment the Commission can require the grantee to investigate the matter and report the results to the Commission.[7] Therefore, we conclude that the manufacturer code is not necessary for enforcement purposes.

8. In view of these conclusions, we are deleting the manufacturer code requirements. In the future the three spaces in the FCC ID that follow the grantee code may be used by applicants as part of the product code. However, applicants need not assign a 14 character equipment product code; indeed they are encouraged to use the minimum number of spaces they consider necessary to adequately identify their products. For record purposes, the three characters in the existing equipment FCC ID's that identify the manufacturer will now be considered part of the equipment product code.[8]

9. *Trade Names.* The *Notice* proposed to permit grantees to market approved equipment under any trade name without submitting additional filings as long as the the equipment is marked with the appropriate FCC identification label. The commenters generally support this proposal. Linear, while supporting the concept of the proposal to delete the application filing requirement when changing or adding trade names, suggests that the Commission continue to collect trade name information through an informal procedure such as the filing of a notification. Linear believes that trade name information is beneficial to the Commission's ability to control the marketing of non-compliant devices.

10. As we observed in the *Notice*, some grantees supply the same device for marketing under as many as 30 different trade names. Our experience with the equipment identification rules indicates that it is not necessary to require filing of separate applications for authorization of equipment when new trade names are added for identical equipment. Differences among such equipment usually extend only to cabinet changes and front panel name changes and have no bearing on the devices compliance with our technical standards. Moreover, the filing requirements are administratively burdensome to the Commission and grantees alike and contribute to delays in the equipment authorization process. We also find no need for routine collection of this information in our enforcement activities. We can obtain a list of trade names under which a device is marketed on an *ad hoc* basis as need. We disagree with Linear that it is desirable to continue to collect trade name information through an informal notification procedure. While such an approach would avoid delays imposed by the current requirements, the only effective administrative difference between an application filing and an informal written notification, would be that no filing fee would be required with an informal notification. Neither the grantee's nor the Commission's burden would be significantly reduced if an informal reporting procedure were to be adopted. The grantee would have to compile and mail the information, and the Commission would have to maintain records of the information. Therefore, we are amending the Rules to eliminate the existing requirement that grantees file for a new authorization when trade names are changed or added and to add a new Section 2.924 that specifically permits grantees to market approved equipment under any trade name without additional filings as long as the equipment is electrically identical within the purview of a class one permissive change, and is marked with the appropriate FCC identification label.[9]

11. *Format of identification label.* We proposed to permit only alphanumeric characters in the FCC ID. This proposal was intended to avoid a particular problem of confusion that often arises in identification of equipment. We observed that positive identification of equipment is difficult in many cases because blank spaces and punctuation marks often are displayed on equipment in a different manner than they appear in the Commission's record for that equipment. Several commenters argue that there is need to separate the various data elements in the FCC ID by a punctuation mark for administrative reasons. Several of these parties request that punctuation marks such as the dash or hyphen (-) and the virgule (/) be permitted. Although we continue to believe that it is necessary to restrict equipment numbers to alphanumeric characters for the reason stated above, we recognize that the grantees have legitimate needs for some form of punctuation mark to be used in the equipment identification number. However, because we continue to believe the use of punctuation marks should be kept to a minimum, we believe only one punctuation mark should be permitted. Accordingly, since the dash is the most distinct punctuation mark, we are revising the rules to specify that only alphanumeric characters and the dash (-) are permitted to be used in the equipment identification number.

12. The current rules require that a grantee or trade name be displayed on the identification label of authorized equipment.[10] The trade name displayed on the label must be indicated on the application for authorization of the equipment. The rules also specify the format of the identification label and require that the FCC information on the label must be circumscribed by a line. The rules further provide that equipment must not be marked so to appear to have more than one trade name. These requirements were originally adopted to avoid possible confusion of FCC identification with other information on the device. Due to the small size of some equipment, compliance with these requirements is not always easily achieved. In addition, the requirement that a device not be marked so as to appear to have more than one trade name often leads to confusion and delay in processing applications. Brand names or commercial names that appear on authorized equipment in many instances are different from the trade name that appears on the FCC label. This gives rise to questions in the authorization process about whether the device is marked so as to appear to have more than one trade name. In such cases,

application processing is delayed until the matter is resolved. In the *Notice*, we proposed to delete the requirement that the grantee name or trade name appear on the FCC identification label, to delete the requirement that the FCC identification label be circumscribed by a line, and to permit FCC labels to be combined with other labels that are required to be placed on the device. The commenters support these proposals.

13. In view of our finding above that routine display of trade names is not necessary for our regulatory activities, we see no need to continue to require trade names as part of the FCC identification. Hence, we conclude that it is no longer necessary to require the display of trade names on the FCC identification label. With the elimination of the requirement for display of trade name on the label, there is no need to continue to require that devices be marked so as not to have more than one trade name.

14. We also find no need to continue to require that the FCC information on the label be circumscribed by a line. With the elimination of the requirement for display of trade name and, as discussed below, country of origin on the label, the only element remaining that would be circumscribed by a line is the FCC ID. As this element also must be prefaced by "FCC ID:", it is readily discernible from other information on the FCC label and information on any other labels that may be on the device. The FCC ID does not require the additional highlighting provided by a circumscribing line. Therefore, it is no longer necessary to separate the FCC label from other labels, i.e. labels which attest to safety testing, electric codes and power requirements.

15. Accordingly, we are amending the rules to reflect that the display of the grantee name or trade name on the FCC identification label is no longer required. However, grantees will have the option of displaying the grantee or trade name on the FCC identification label if they choose to do so. Further, the rules are amended to reflect that the FCC identification label need not be circumscribed by a line and that it may be combined with other labels that are required to be affixed to the device. However, we will continue to require that the label displaying the FCC identification be external and permanently affixed to the equipment so that it may readily be seen at the time of purchase. These modifications to the rules will provide grantees flexibility to avoid affixing several labels to a device and will facilitate the labeling of small devices.

16. *Country of origin of equipment.* As stated in the *Notice*, the requirement to specify the country of origin on the identification label was added to the current FCC equipment identification program at the request of the United States Customs Service (USCS).[11] However, we are concerned that the appearance of the country of origin on the identification label may be misleading. Our rules do not define the term "country of origin." They do not specify, for instance, whether equipment assembled in the United States from imported parts is to be classified as being of domestic or foreign origin. However, the Commission traditionally considers only the final place of assembly as the country of origin. We have been informed that the USCS, in determining the country of origin of a device, considers the country or countries of origin of its parts and the proportions of such parts in the device. In view of the differences between our approach and that of USCS and the fact that the USCS has its own system of regulations concerning the labeling of foreign products, we proposed to delete this requirement from our rules.

17. Most commenters support the deletion of the country of origin as an equipment identification element on the identification label. However, some commenters argue for the retention of the country of origin requirement. The thrust of their argument is that prospective buyers can readily use the label to identify equipment that is not made in the United States. Multi-Elmac contends that the FCC requirement for indicating country of origin should be retained because the USCS has provisions such as the "Ultimate purchaser" clause which would allow foreign goods to be imported into the United States without being labeled as to the country of origin.[12] Multi-Elmac argues that American manufacturers and consumers have the right to expect that all products marketed in the United States will carry information regarding the product's country of origin.

18. While we understand the commenters concern regarding adequate labeling of equipment not produced in the United States, we also observe that the USCS is the Federal Government agency with primary responsibility for matters regarding the labeling of products with their country of origin. We believe the issue of whether to require that the country of origin be specified on imported products for purposes of general consumer information should more appropriately be left to the agency that has direct responsibility over the labeling of imported goods. We see no need at this time to maintain country of origin labeling requirements for communications policy purposes. Accordingly, we are amending our rules to delete the requirement to indicate the country of origin on the FCC label.

Equipment sampling by the Commission.

19. As indicated in the *Notice*, the Commission engages in equipment sampling to ascertain if the devices being marketed conform to the specifications set forth in their applications for equipment authorization. However, because the current rules do not specify a time limit for grantees to respond to our requests for samples, our sampling program suffers delays in detecting and halting the marketing of non-compliant equipment. In the *Notice* we proposed to impose a 30 day time limit for responses to requests for equipment samples. Some commenters indicate that administrative delay often occurs in large organizations and to allow for this it would be more reasonable to provide a 60 day response time. Other commenters state that in some cases lack of inventory would not permit grantees to respond in such a short period of time. They indicate that some grantees only manufacture the amount of product required to fill orders. Most commenters suggest that in these instances the rules should allow the respondent to provide either the requested equipment or a written response within the prescribed time frame.

20. After review of the comments, we are persuaded that 60 a day time period for submission of samples is more appropriate than the proposed 30 days. This longer time period will provide ample time for grantees to complete any of their own internal procedures that may be involved in submitting a sample of a particular device. We also do not believe the additional time will substantially impede or hinder the effectiveness of our sampling program, as there is no *a priori* reason to expect that a given device selected for testing is not in compliance with the Rules. We recognize that in many instances a grantee may not have adequate inventory on hand to submit a

sample on short notice. Because a 60 day period also will provide more than adequate time for grantees in such situations to arrange to provide a unit for testing, we do not believe that there is any reason to allow submission of a letter as response in lieu of the requested equipment sample. Such an alternative would unnecessarily undermine the intent of the rule, *i.e.*, the timely submission of an equipment sample for testing. Accordingly, we are adopting a new requirement that equipment selected for testing must be submitted within 60 days of the date receipt of the request. Failure to supply the requested equipment within the allotted time frame may result in administrative sanctions as may be appropriate, or may include a halt in the processing of any applications that the grantee may have before the Commission until the matter is resolved. In some circumstances, for example where there is harmful interference or concern about the operation of equipment involving safety of life or property, the Commission may specify a shorter time period for grantees to submit equipment samples. Alternatively, the Commission may, upon good cause shown, consider requests for extension of time from grantees.

21. Currently we request a sample by letter and in most cases allow the grantee to select and ship a sample of the requested equipment. In some cases, the Commission has requested that several representative units of a device be made available from which a sample is then selected. In the *Notice*, we requested comment on a proposed procedure to be used by the Commission for selecting a specific unit of equipment for verification of compliance. Under the proposed procedure, the grantee would provide a specific unit chosen from inventory by a Commission representative.

22. The commenters generally oppose this proposal for revising the sampling procedure, arguing that it would be subject to several potential problems. Some parties submit that they do not maintain inventories from which a sample could be selected. Also, commenting parties express concern that if a unit of equipment were selected from a type of equipment not manufactured in large quantities, the grantee might experience difficulties in filling orders. Other commenters cite security procedures that would make it difficult for a FCC representative to enter and remove samples from production or storage facilities. Some commenters state that if they did not have the opportunity to furnish a complete system for testing, the sample unit might be tested in a configuration other than the one for which the equipment authorization was obtained. They state that under such conditions the sample unit may not perform the same as it would if configured as when originally tested for compliance. The comments indicate that in some cases dealing with systems, a single production or storage facility may not have all the components necessary to furnish a representative system for testing.

23. While we are not convinced that the issues raised by the commenters are insurmountable, we are persuaded not to adopt the proposed sampling procedure at this time. The logistical problems the commenters raised in response to this proposal could present a substantial burden to grantees. We conclude that in the absence of evidence indicating that the samples submitted by grantees are not representative of the devices being marketed the burden that would be imposed by having Commission representatives select samples is is not warranted. Thus, we will continue to use our current procedure for obtaining equipment samples for test purposes.

Miscellaneous requirements.

24. The *Notice* also proposed several administrative changes to the equipment authorization rules. The first was to add a new Section 2.910 to the rules to indicate the correct mailing address for submission of equipment samples and/or test data to the Commission.[13] Commenters supported this proposal as a means to facilitate the submission process. We are adding the new Section 2.910 to the rules as proposed.

25. The second administrative proposal was to modify Section 2.934, which currently addresses changes in the name of a grantee, by requiring that changes in the name and/or address of a grantee by filed with the Commission no later than 30 days after the change occurs.[14] As some of the commenters noted, the *Notice* erroneously proposed that notification would be required 30 days before the change was effective. Section 2.934 currently allows grantees 60 days to file a change of name and is silent on changes of address. Commenters did not oppose this proposal. We are modifying Section 2.934 as proposed. These changes will enable the Commission to maintain more accurate records of grantee name and address information.

26. The third proposal was to revise Section 2.954 to clarify that the identification used on equipment subject only to verification is not to be of a type and format that could be confused with the FCC Identifier used on certified, notified, type accepted, or type approved equipment.[15] There was no opposition to this proposal. We are revising Section 2.954 as proposed. This modification will avoid possibly mistaking verified equipment for equipment which have been approved under one of the other types of equipment approval procedures.

27. The final administrative proposal was to revise Sections 2.1043(b) and (d), which address permissive changes in certificated equipment, to more accurately reflect the proposed changes in the FCC equipment labeling requirements.[16] These rule sections are being modified to correspond to the changes in FCC labeling requirements discussed above. The change in Section 2.1043(b) eliminates reference to changes in model number. The change in Section 2.1043(d) is to replace the reference to the "name and model number" of a device with a reference to the "identification" of a device.

Other issues raised by commenters.

28. Several commenters recommended changes in the Commission's Rules and current practices which were not proposed in the *Notice*. One suggestion was to amend those aspects of Part 68 dealing with the registration form of equipment authorization in order to be consistent with the amendments to Part 2 which we are adopting in this proceeding. Another suggestion was to change the Commission's practice of pre-grant sampling of personal computers. There was also a request to permit the marketing of devices prior to receiving Commission authorization under the permissive change rules. We find these proposals to be beyond the scope of this proceeding and, therefore, are not acting on them herein.

PROCEDURAL MATTERS

29. Pursuant to 5 U.S.C. 601 et seq., the Final Regulatory Flexibility Analysis has been prepared.

I. Need and purpose of this action:

The regulations adopted herein are intended to relieve applicants for equipment authorization from unnecessary application filings and increase the grantee's flexibility when labeling equipment. The administrative and equipment sampling rule adopted herein are intended to increase the efficiency of our equipment authorization and sampling procedures.

II. Summary of Issues Raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

No Comments were received that specifically addressed the Initial Regulatory Flexibility Analysis in this proceeding. Moreover, our action today imposes no new reporting or record keeping requirements. There should be a savings to the grantees of approximately 26,400 hours by the elimination of application filing requirements in this proceeding as well as $ 700,000 in filing fees.

III. Significant Alternatives:

The Commission considered all the alternatives in this proceeding, and considered all timely filed comments directed to the various issues in the *Notice*. After carefully weighing all aspects of this proceeding, the Commission has adopted the most reasonable course under the mandate of the Communications Act of 1934, as amended. The only significant alternative would be to retain the current rules and, in the case of response to equipment sampling requests, require a quicker response. For the reasons given in this order, we believe these alternatives would unnecessarily impose additional costly regulatory burdens on the industry.

PAPERWORK REDUCTION ACT STATEMENT

30. The proposal contain herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to decrease the information collection burden which the Commission imposes on the public. This proposed reduction in information collection burden is subject to approval by the Office of Management and Budget as prescribed by the Act.

ORDERING CLAUSES

31. Accordingly, IT IS ORDERED, that pursuant to the authority of Sections 4(i), 302 and 303(r), Part 2 of Chapter I of Title 47 of the Code of Federal Regulations IS AMENDED as set forth in the Appendix B below, effective **February 21, 1989.**

32. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

List of Commenters

Initial Comments

1. American Telephone and Telegraph
2. Compaq Computer Corporation
3. Computer and Business Equipment Manufactuters Association
4. Craig, Mr.Dana B.
5. Digital Microwave Corporation
6. Door Operator and Remote Control Manufacturers Association
7. Electronic Industries Association, Consumer Electronics Group
8. General Electric Mobile Communications Business
9. Global-Wulfsberg System Division of Sundstrand Data Control, Inc.
10. GTE Service Corporation
11. Hanttula, Mr. David M.
12. Harmon Industries, Inc.
13. Harris Corporation – Farinon Division
14. Heron, Burchette, Ruckert and Rothwell
15. Hewlett Packard
16. International Business Machines Corporation
17. Linear Corporation
18. Met Electrical Testing Company
19. Motorola, Inc.
20. Multi- Elmac Corporation
21. Rockwell International Corporation
22. Toshiba Corporation

Reply Comments

1. Compaq Computer Corporation
2. General Electric Mobile Communications Business
3. Motorola, Inc.

APPENDIX B

Part 2 of Chapter I, Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 2 is revised to read as follows:

Authority: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, and 307, unless otherwise noted.

2. All authority citations contained in Subparts I, J, and K are deleted.

3. A new Section 2.910 is added to read as follows:

Section 2.910 Submittal of equipment authorization application or information to the Commission.

(a) Applications and Fees for equipment authorization shall be submitted to the FCC, 1919 M Street North West, Washington D.C. 20554 -1300, unless otherwise directed.

(b) Any information or equipment samples requested by the Commission pursuant to the provisions of Subpart J of this Part shall, unless otherwise directed, be submitted to the FCC, Authorization and Evaluation Division, 7435 Oakland Mills Road, Columbia, MD 21046.

4. A new Section 2.924 is added to read as follows:

Section 2.924 Marketing of electrically identical equipment under multiple trade names and models or type numbers under the same FCC Identifier.

The grantee of an equipment authorization may market devices having different model/type numbers, or trade names without additional authorization provided such devices are elecrically identical within the purview of a class one permissive change and the equipment bears an FCC Identifier validated by a grant of equipment authorization. *See* Section 2.932.

5. In Section 2.925, paragraph (a) is revised, and the last sentence in paragraph (b)(1) is removed, to read as follows:

Section 2.925 Identification of equipment.

(a) Each equipment covered in an application for equipment authorization shall bear a nameplate or label listing the following:

(1) FCC Identifier consisting of the two elements in the exact order specified in Section 2.926. The FCC Identifier shall be preceded by the term "FCC ID:" in capital letters on a single line, and shall be of a type size large enough to be legible without the aid of magnification.

EXAMPLE: FCC ID: XXX123.

XXX - Grantee Code

123 - Equipment Product Code

(2) Any other statements or labeling requirements imposed by the rules governing the operation of the specific class of equipment, except that such statement(s) of compliance may appear on a separate label at the option of the applicant/grantee.

(3) Equipment subject only to registration will be identified pursuant to Part 68 of this chapter.

(b) * * *

(1) Separate FCC Identifiers may be assigned to a device consisting of two or more sections assembled in a common enclosure, but constructed on separate sub-units or circuit boards with independent frequency controlling circuits. The FCC Identifier assigned to any transmitter section shall be preceded by the term "TX FCC ID:", the FCC Identifier assigned to any receiver section shall be preceded by the term "RX FCC ID:" and the identifier assigned to any remaining section(s) shall be preceded by the term "FCC ID:".

* * * * *

6. In section 2.926, paragraphs (a),(b),(c) and (d) are revised as follows:

Section 2.926 FCC Identifier.

(a) A grant of equipment authorization issued by the Commission will list the validated FCC Identifier consisting of the grantee code assigned by the FCC pursuant to paragraph (c) of this section, and the equipment product code assigned by the grantee pursuant to paragraph (d) of this section. *See* example provided in Section 2.925.

(b) The grantee code assigned pursuant to paragraph (c) of this section is assigned permanently to applicants /grantees and is valid only for the party specified as the applicant/grantee in the code assignment(s).

(c) A grantee code will have three characters consisting of Arabic numerals, capital letters, or combination there of. A prospective grantee or his authorized representative may submit a written request to the Commission for assignment of a grantee code at any time. However, it is preferred that grantee codes be requested prior to filing applications for equipment authorization. If a grantee code is not requested in advance, one will be assigned at the time an application is received by the FCC Laboratory and the applicant will be notified to make any necessary label revisions in order to comply fully with application procedural rules.

(1) After assignment of a grantee code each grantee will continue to use the same grantee code for subsequent equipment authorization applications. In the event the grantee name is changed or ownership is transferred, the circumstances shall be reported to the Commission so that a new grantee code can be assigned, if appropriate. *See* Sections 2.934 and 2.935 for additional information.

(d) The equipment product code assigned by the grantee shall consist of a series of Arabic numerals, capital letters or a combination thereof, and may include the dash or hyphen (-). The total of Arabic numerals, capital letters and dashes or hyphens shall not exceed 14 and shall be one which has not been previously used in conjunction with:

(1) The same grantee code, or

(2) An application denied pursuant to Section 2.919 of this chapter.

* * * * *

7. In Section 2.929 paragraph (b)(3) is removed.

8. Section 2.934 is revised to read as follows:

Section 2.934 Change in name and/or address of grantee.

Whenever there is a change in the name and/or address of the grantee of an equipment authorization, written notice of such change(s) shall be submitted to the Commission within 30 days after the grantee starts using the new name and/or address. *See* Section 2.910 (b).

9. A new Section 2.946 is added to read as follows:

Section 2.946 Penalty for failure to provide test samples and data.

(a) Any party holding a grant of equipment authorization issued by the Commission, or who markets equipment subject to the provisions of this chapter shall provide test sample(s) or data upon request by the Commission. Failure to comply with such request within 60 days may be cause for forfeiture, pursuant to Section 1.80 of Part 1 of this chapter, or other administrative sanctions such as suspending action on any applications for equipment authorization submitted by such party while the matter is being resolved.

(b) In the case of equipment involving harmful interference or safety of life and property, the Commission may specify that test samples be submitted within less than 60 days, but not less than 14 days. Failure to comply within the specified time period will be subject to the sanctions specified in paragraph (a).

(c) The Commission may consider extensions of time upon submission of a showing of good cause.

10. Section 2.954 is revised to read as follows:

Section 2.954 Identification.

Devices subject only to verification shall be uniquely identified by the person responsible for marketing or importing the equipment within the United States. However, the identification shall not be of a format which could be confused with the FCC Identifier required on certificated, notified, type accepted or type approved equipment. The importer or manufacturer shall maintain adequate identification records to facilitate positive identification for each verified device.

11. Section 2.1035 is removed.

12. In Section 2.1043, paragraphs (b) and (d) are revised to read as follows:

Section 2.1043 Changes in certified equipment.

* * * * *

(b) Two classes of permissive changes may be made in certificated equipment without requiring a new application for and grant of certification. Neither class of change shall result in a change in identification.

* * * * *

(d) A modification which results in a change in the identification of a device with or without change in circuitry requires a new application for, and grant of certification. If the changes affect the characteristics required to be reported, a complete application shall be filed. If the characteristics required to be reported are not changed the abbreviated procedure of Section 2.933 may be used.

13. Section 2.1300 is revised to read as follows:

Section 2.1300 Cross reference.

The general provisions of this part, Sections 2.909, 2.923, 2.927, 2.935, 2.936, and 2.946 shall apply to applications for and grants of registration for telephone terminal equipment pursuant to Part 68 of this Chapter.

FOOTNOTES

[1] This identification system was implemented in the *Report and Order* in GEN. Docket 20790, 45 R R 2d 349 (1979), and amended in the *Order* in GEN. Docket 20790, FCC 81-98, 46 FR 21012 (April 8,1981).

[2] *See* 47 C.F.R. Section 2.926. The format of the FCC ID is:

FCC ID: XXXYYY123

where: XXX = Grantee Code (3 alphanumeric characters)

YYY = Manufacturer Code (3 alphanumeric characters)

123 = Product Code (1 to 11 alphanumeric characters)

[3] *See* 47 C.F.R. Section 2.925.

[4] *See* 47 C.F.R. Sections 2.925 and 2.933.

[5] *See* 47 C.F.R. Section 2.957.

[6] *See Notice of Proposed Rule Making* in GEN. Docket 87-212, 2 FCC Rcd 3637 (1987).

[7] *See* 47 C.F.R. Section 2.937.

[8] On August 23,1988, the President signed the Omnibus Trade and Competitiveness Trade Act (P.L. 100 - 418). Section 1380 (b)(1)(A) of the Act states:

> Any product of a foreign country that is subject to registration or approval by the Commission may be entered only if-
>
> (i) . . . .
>
> (ii) The information which is required on Federal Communications Commission Form 740 is provided to the appropriate customs officer at the time of such entry in such form and manner as the Secretary of the Treasury may prescribe.

Removal of the manufacturers code from the FCC Identifier will not materially change FCC Form 740, nor adversely affect the Secretary's ability to use it. In fact a separate block on Part I of the Form requires the manufacturer's name and address.

[9] *See* 47 C.F.R. Section 2.932.

[10] *See* 47 C.F.R. Section 2.925.

[11] *See Report and Order* in GEN Docket 20790, 45RR 2d at 353.

[12] *See* 19 U.S.C. Section 1304(a)(3)(H)(1987). This exception allows an importer, in certain circumstances, to acquire products from foreign markets and sell them in the United States without including their country origin on the label.

[13] *See* 47 C.F.R. Section 2.910.

[14] *See* 47 C.F.R. Section 2.934.

[15] *See* C.F.R. Section 2.954.

[16] *See* 47 C.F.R. Section 2.1043(b) and (d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications for
Transfer of Control of

SOUTHERN SATELLITE SYSTEMS, INC., Licensee of earth stations WK47, Douglasville, GA and E7990, Atlanta, GA and licensee of point-to-point microwave stations WCU578, Atlanta, GA and WLB957, Douglasville, GA; Tempo Television, Inc., licensee of earth station E4599, Douglasville, GA

File Nos. 1038-DSE-TC-88
1039-DSE-TC-88(2)
1551-CF-TC(2)-88

MEMORANDUM AND OPINION ORDER

Adopted: December 15, 1988; Released: January 5, 1989

By the Chief, Common Carrier Bureau:

1. Tempo Enterprises Inc. (Tempo) has filed applications to transfer control of Southern Satellite Systems, Inc. and Tempo Television, Inc. to Tempo Acquisition Co., a wholly owned subsidiary of Tele-Communications, Inc. (TCI). This transfer is part of a proposed merger of Tempo and TCI. The Wireless Cable Association (Wireless Cable)[1] has filed comments which do not oppose the transfer but which raise questions regarding the effect on competition in the retail market for satellite delivered programming.

2. Wireless Cable is concerned that the proposed transfer would result in a vertical integration, putting a large cable operator in control of two important sources of programming. Wireless Cable believes that programmers refuse to provide services to wireless cable operators if they are afraid of offending cable firms or if the programmers are owned by cable operators. It argues that wireless cable operators cannot obtain programming or, when they can make arrangements, the programmers charge discriminatorily high prices. In addition, with respect to TCI specifically, Wireless Cable points out that it has been found guilty of anti-trust violations in the past.[2] In order to remedy any possible anit-competitive repercussions, Wireless Cable requests that TCI be required to provide assurances that it will sell its acquired programming to wireless cable firms at non-discriminatory prices. TCI responded by letter stating that issues relating to the structure of the cable industry are not appropriate matters for consideration in this proceeding and that the Justice Department has not indicated that it has antitrust objections to the proposed merger.

3. The conduct Wireless Cable alleges to be anticompetitive on the part of TCI has not been documented in this proceeding. We therefore have no basis on which to condition this transfer as proposed. The entities being acquired, Southern Satellite and Tempo TV, are operating as common carriers and therefore have the obligation under the Communications Act to provide services upon reasonable request without unjust or undue discrimination. [3] Violation of these obligations could subject these licensees to complaint procedures whereby documented activities -- and not their mere possibility -- can be evaluated.[4]

4. With respect to Wireless Cable's description of the market for satellite-delivered programming, the Commission has concluded that no price regulation of this service is necessary at this time.[5] In support of its conclusion, the Commission cited an ongoing Department of Justice investigation addressing this issue as well as a number of other matters. These included the fact that price regulation may have significant administrative costs, may have the unintended effect of reducing the efficiency of distribution, and may not be effective in checking cable market power if it does exist. The concerns raised by Wireless Cable do not amount to sufficient specific evidence that would be necessary to reverse our conclusion. We therefore deny Wireless Cable's request to impose any unique distribution or economic requirements on TCI. In addition, we find that, pursuant to Section 310(d) and 308(b), grant of this application will serve the public interest, convenience and necessity by providing continued service to the public.

5. Although Wireless Cable's allegations are not specific enough to warrant imposition of conditions on this transfer, the Commission, pursuant to Congressional directive,[6] will be preparing a report on whether there is discrimination with respect to distribution of satellite delivered programming. The general concerns raised by Wireless Cable will be addressed in that report.

6. IT IS THEREFORE ORDERED that Applications File Nos. 1038-DSE-TC-88, 1039-DSE-TC-88(2) and 1551-CF-TC(2)-88 to transfer control of Southern Satellite Systems, Inc. and Tempo Television, Inc. to Tempo Acquisition Company ARE GRANTED.

7. IT IS FURTHER ORDERED that all existing terms and conditions applicable to the authorizations subject to this order shall remain in full force and effect.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Wireless Cable describes itself as a trade association of programming distributors using various microwave radio services and equipment manufacturers and suppliers of related equipment.

[2] *See* Central Telecommunications, Inc. v. TCI Cablevision, Inc., 800 F.2d 711 (8th Cir. 1986), *cert. denied* 107 S. Ct. 1358 (1987). Although adjudicated broadcast related antitrust violations or misrepresentation to a governmental entity may, in some situations, give rise to questions regarding an applicant's character qualifications to be a licensee of the Commission, in the context of this proceeding, these violations do not warrant a denial of the transfer application. The Commission has stated

that character inquiries in broadcasting services may be different from those applied to other services. *See* Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1202, at n. 52 (1986) *on reconsideration*, 1 FCC Rcd 421, 424 (1986); Arizona Mobile Telephone Co., FCC 83-157, 53 R.R. 2d 1011, 1016-18, (April 13, 1983). TCI holds numerous licenses for earth stations and, to the best of our knowledge, has fulfilled its obligations as a licensee. Based on the record presented here, there is no evidence that TCI will conduct itself otherwise in the future. We note, however, that character questions relating to the antitrust case have been raised in the context of TCI's pending Direct Broadcast Satellite (DBS) applications (File No. DBS-88-04) and will be addressed fully in that proceeding. Our grant in this proceeding may be revisited after the outcome of the DBS proceeding.

[3] *See, e.g.*, 47 U.S.C. §§ 201, 202.

[4] 47 U.S.C. § 208.

[5] Inquiry into the Scrambling of Satellite Television Signals and Access to Those Signals by Owners of Home Satellite Dish Antennas, 3 FCC Rcd 1202, 1209 (1988).

[6] *See* Satellite Home Viewer Copyright Act of 1988, H.R. 2848 § 713, which was signed on November 16, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

KERRVILLE TELEPHONE COMPANY — File No. 23192-CD-P/L-01-86

For authority to construct and operate a new paging facility in the Public Land Mobile Service on 159.10 MHz at Kerrville, Texas

AMERICAN PAGING, INC. (of Texas) — File No. 24540-CD-P/L-01-86

For authority to construct and operate a new paging facility in the Public Land Mobile Service on 158.10 MHz at Lake Hills, Texas

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1988; Released: January 5, 1989

By the Chief, Common Carrier Bureau:

1. In *Public Notice*, Report No. PMS-87-24, released March 11, 1987, the captioned applications of Kerrville Telephone Company (KTC) and American Paging, Inc. (of Texas), (API) were designated as mutually exclusive. On April 2, 1987, API submitted a Petition for Comparative Hearing requesting comparative consideration of the KTC and API applications. In *Kerrville Telephone Company* (MSD Order), 2 FCC Rcd 2288 (1987), the Mobile Services Division (MSD) denied API's comparative hearing request and scheduled the applications for disposition by lottery.[1] The MSD concluded that because API had not submitted "any evidence to demonstrate existing subscriber demand for expanded service," API had not satisfied the eligibility requirements of Section 22.33(c)(1) of the Rules.[2] On May 20, 1987, API filed a Petition for Reconsideration (Petition) requesting that the Bureau reconsider the MSD Order, reinstate API's application, and grant API's request for comparative consideration.

2. API challenges the MSD's decision to deny API's request for comparative hearing solely on the basis that API failed to demonstrate any existing subscriber demand for expanded service. In so doing, API argues, the MSD did not consider the public interest showings API did make. [3] Such public interest showings, API's argues, must be accepted in a request for comparative consideration if Section 22.33(c) is to have its intended meaning. Further, API asserts its public interest showings are precisely the sort contemplated by the Commission in *Lottery Selection Among Applicants MO&O*, 57 Rad. Reg. 2d (P&F) 427 (1980) which allowed comparative hearings in lieu of lotteries. Moreover, API argues, under the MSD decision in *Southwestern Bell Telephone Company (Southwestern)*, 2 FCC Rcd 1785 (1987), an applicant must show not only a demand for expanded service, but also show that its service is unique. In view of this ruling, API argues, a demonstration of existing consumer demand for expanded service cannot be made by any applicant, and therefore, it would be a waste of effort to present the demand showing at all.

3. In response, KTC states that the MSD correctly denied API's request for comparative consideration because API failed to demonstrate consumer demand for expanded service. In addition, KTC emphasizes that the MSD properly did not reach the public interest issue, but instead denied API's request for failure to satisfy both of the eligibility requirements of Section 22.33(c).[4]

4. We find, after reviewing API's Petition for Reconsideration, the responsive pleadings and the relevant case law that the MSD correctly denied API's request for comparative hearing. Section 22.33(c) allows for comparative consideration if the Commission finds the applicant has met the eligibility requirements of Section 22.33(c)(1), and has also demonstrated how the public interest will be served by a hearing rather than a lottery. Section 22.33(c)(1) requires the applicant to demonstrate that its proposed station is within forty miles of its existing station operating on the same frequency and to demonstrate a demand by existing subscribers for expanded service. The demand for expanded service must be affirmatively shown. For example, in *Ram Communications of Michigan, Inc. (Ram)*, 1 FCC Rcd 145 (1986), the Common Carrier Bureau found the applicant had satisfied the demand showing by producing "specific information as to numbers of units, area covered and the purpose to be served" by the application. *Id.* at 142, n.2. Subsequently, in *Speed Call, Inc.*, 2 FCC Rcd 6530 (1987) the MSD denied a similar request on the ground that the applicant had submitted seventeen subscriber survey forms indicating a need for expanded coverage, instead of the detailed information required by *Ram*. Moreover, in *Biddle Communications Industries, Inc.*, 3 FCC Rcd 352 (1988) the MSD found the demand showing requirement was not satisfied when the applicant failed to demonstrate specifically a demand for expanded service in the actual area with which the hearing would be concerned. In support of its request for comparative consideration API has not submitted any evidence of existing consumer demand for expanded service.[5] Public interest showings must be made in addition to the showings of eligibility required by the rule. API having failed to satisfy the eligibility requirements for comparative consideration, is not entitled to a comparative hearing.

5. Accordingly, IT IS ORDERED, that API's request for reconsideration IS DENIED and the decision of the Chief of the Mobile Services Division IS AFFIRMED.

6. This action is taken under Section 0.291 of the Commission's rules and is effective on the date of release. Applications for review under Section 1.115 of the rules may be filed within 30 days of the public notice of the order.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] A lottery was held on April 24, 1987. KTC was selected first and API's application was dismisssed.

[2] Section 22.33(c)(1) provides, in pertinent part, that an applicant is eligible to make a request for a comparative hearing when it is "proposing to add one or more transmitter locations to an authorized station on the same frequency or frequencies for which it is already licensed and within 40 miles of existing transmitter locations to those frequencies, and when the applicant demonstrates in its application a demand by its existing subscribers for the expanded service . . . ."

[3] API's "public interest" showing included arguments that (1)API's proposed paging facility would provide improved area-wide service to existing subscribers; (2) KTC has no existing facilities and therefore had no need to serve existing customers; (3) there are other frequencies available to KTC and; (4) the facility proposed by KTC would be unable to expand significantly its service area in the direction of Austin or San Antonio.

[4] KTC also argues that API's application is defective. API subsequently filed an amendment to its application. The amendment corrected a typographical error, and contained an additional interference analysis. KTC has filed a Petition to Dismiss the Amendment.

[5] Contrary to API's interpretation, the *Southwestern* decision, did not require an applicant requesting a comparative hearing to show that its service is unique as compared to all other service providers. That case merely stated that the applicant had not demonstrated that the customers desiring expanded coverage could not be served just as well by those companies with which comparative consideration was requested.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BELLSOUTH AAD 8 - 1901

Petition for Waiver of
Section 32.4240 of the
Commission's Rules to Permit
Amortization of Debt
Refinancing Expenses,
Unamortized Discounts and
Premiums Associated with
Reacquired Debt Either Over
the Life of the Replacement
Issue or Over the Remaining
Life of the Called Debt Issue.

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1988; Released: January 5, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On January 28, 1988, BellSouth Corporation and South Central Bell Telephone Company, and BellSouth Corporation and Southern Bell Telephone and Telegraph Company (BellSouth) filed two separate petitions for waiver of Section 32.4240 of the Commission's Rules to allow amortization of debt refinancing expenses including unamortized discounts and call premiums associated with reacquired debt. The amortization period requested by BellSouth is either over the life of the replacement debt issue or over the remaining life of the called debt issue. For reasons discussed in the succeeding paragraphs, we deny the BellSouth petitions.

II. BACKGROUND

2. When debt is issued, the cash actually received is often different than the face amount to be paid at maturity. When the cash received is higher than the face amount, the difference is called a premium, and when the amount of cash received is less than the face amount, the difference is called a discount. These premiums and discounts adjust the value of the debt security to reflect that the interest rate at time of issue is lower or higher than the interest rate stated on the debt security. Over the term of the debt, premiums or discounts are amortized so that at maturity, the recorded amount of debt will coincide with the face amount actually owed at maturity.

3. When debt is extinguished (paid off) before its maturity, the amount actually paid out, the reacquisition cost,[1] is often different than its net carrying amount.[2] When there is a difference between the net carrying amount and the reacquisition cost, a gain or loss results from extinguishing the debt. The prescribed accounting treatment, under both Part 31 and Part 32 of the Commission's Rules[3] requires that these gains and losses associated with reacquired debt be included in the determination of net income in the period of extinguishment. Thus, a gain or loss is recognized in the current period. However, in the case of refinancing (*i.e.*, paying off old debt with new borrowing), Part 31 permitted these gains or losses (usually losses) to be associated with the new debt and to be amortized to income or expense accounts over future periods when specific approval of this Commission was obtained. Part 32 did not contain language that allowed carriers to request permission for this amortization treatment because such treatment is inconsistent with generally accepted accounting principles (GAAP). GAAP requires that the differences between the reacquisition price and the net carrying amounts of the extinguished debt be recognized in the year of extinguishment as a loss or gain, whether refinancing is involved or not.[4]

4. On March 26, 1987, BellSouth filed a Petition for Rule Making to amend Part 32 to include language similar to that contained in Part 31, which would permit carriers to request permission for the amortization of gains or losses associated with the reacquisition of long-term debt when refinancing is involved. BellSouth contended that permitting such amortizations would often work to the benefit of ratepayers since carriers would be more inclined to refinance at lower interest rates if large losses could be deferred instead of being absorbed in the year of extinguishment.

5. This Commission was not persuaded by BellSouth's contention that such provisions for requesting approval were necessary in Part 32. In a *Memorandum Opinion and Order*,[5] which dealt with that petition, the Commission noted that such amortizations were inconsistent with GAAP and that a carrier could request a waiver to amortize gains or losses on debt reacquisitions, if it could demonstrate that such an amortization would be in the best interests of ratepayers. The Commission therefore denied BellSouth's Petition for Rule Making. On November 30, 1987, prior to filing its Petitions for Waiver, BellSouth filed a Petition for Reconsideration to request that this Commission reconsider its decision in the *Pension and Amortization Order* not to amend Part 32 to include provisions similar to those contained in Part 31. The Petition for Reconsideration is still pending.

III. PETITIONS FOR WAIVER

6. Shortly after the Petition for Reconsideration was filed, BellSouth filed the two Petitions for Waiver at issue here. The petitions are for debt reacquisition transactions that Southern Bell and South Central Bell planned to execute while interest rates remain low in relation to the interest rates on outstanding debt they would refinance.[6] BellSouth's two petitions request waivers of Section 32.4240 of the Commission's Rules to allow amortization of debt reacquisition costs including call premiums and unamortized discounts associated with reacquired debt either over the life of the replacement debt issue or over the remaining life of the called debt issue. In the first petition, Southern Bell proposes to refinance $200 million of 11.75% debentures due December 1, 2023, with the sale of $200 million of up to forty year 9% debt securities, due no later than the year 2028.[7] In the second petition, South Central Bell Telephone Company pro-

poses to refinance $100 million of 11.88% debentures due in the year 2023, with the sale of $100 million of up to forty year 9% debt securities, due no later than the year 2028. In addition, South Central Bell Telephone Company also plans to refinance $150 million of 10.88% debentures due in the year 1993, with the sale of $150 million of up to forty year 9% debt securities.[8]

7. For each of the called issues, BellSouth proposes to classify the related call premiums, debt reacquisition expenses, and unamortized balances in the discount account to Account 1407, Unamortized debt issuance expense.[9] The discounts on the new issues would be classified to Account 4230, Discount on long-term debt.[10] BellSouth also proposes to offset the resulting reductions in income taxes by charges to Account 7250, Provision for deferred operating income taxes, and credits to Account 4340, Noncurrent deferred operating income taxes. BellSouth seeks a waiver so that the amounts recorded in Accounts 1407, 4230 and 4340 related to these refinancings will be amortized over the life of the new debt issues or over the life of the called debt issues.

8. BellSouth argues that each of the proposed refinancings are in the best interest of ratepayers because they will reduce the fixed charges ultimately paid by ratepayers by a total of approximately $200 million.[11] BellSouth claims the proposed refinancings are prudent, cost efficient and entirely consistent with the policy that ratepayers should receive good service at reasonable rates. BellSouth states that because these refinancings directly benefit its ratepayers, it is equitable and fully consistent with past Commission actions that these costs, approximately $40.3 million, be included in service rates.

9. BellSouth asserts that the Commission has historically viewed the refinancing of debt at lower costs, when market rates and conditions are favorable, as a reflection of sound and prudent management policy because such refinancing is in the best interest of ratepayers. BellSouth claims that if it is not allowed to amortize the refinancing costs either over the life of the replacement debt issue or over the remaining life of the called debt issue, it would effectively be denied recovery of costs prudently incurred in the conduct of its regulated business. If it is not allowed recovery of these prudently incurred costs, BellSouth claims its stockholders would be required to absorb refinancing costs incurred for the sole purpose of lowering the cost of service of its regulated customers. It is BellSouth's position that there would be a strong disincentive to refinance if these prudently incurred refinancing costs had to be absorbed by stockholders. BellSouth alleges that if stockholders are required to absorb these costs it will be adversely affected because of the resulting negative impact on its cost of equity, which is an integral determinant of its overall rate of return. It also alleges that the same would hold true if these refinancing costs had to be absorbed by current ratepayers. BellSouth states that requiring the current customers to absorb these costs could result in the current customers unjustly paying costs that benefit future customers. BellSouth states that given such a situation, the application of GAAP is totally inappropriate for regulated entities.

10. BellSouth claims that if it obtains its requested waivers and follows the accounting proposed in its petitions, its income accounts will correctly reflect the cost of borrowed money for regulated companies in the appropriate periods as well as the proper amount of income available for fixed charges in those periods. In addition, BellSouth contends that the call premiums, the unamortized issuance costs and the unamortized discounts on the reacquired issues can be identified and included as a component of the rate base in future tariff filings. Since the estimates submitted with its petitions represent BellSouth's highest estimate of what the refinancing costs will be, it does not propose to file a second request unless the final amounts are significantly higher than these estimates.

IV. COMMENTS

11. All seven of the commenting parties support BellSouth's petitions. However, only Merrill Lynch devotes close attention to the details of any of the contemplated transactions. In the comments, Merrill Lynch notes that the refinancing of high coupon debt with lower interest cost debt is sound corporate policy if the net present value of the costs associated with leaving the old debt outstanding is greater than the net present value of acquiring the old debt and issuing the new debt. Merrill Lynch, in Exhibit A of its comments, provides an analysis of the Southern Bell refinancing scenario but bases its analysis on corporate market conditions in effect on February 22, 1988.[12] This analysis indicates a net present value savings of approximately $30.4 million. Merrill Lynch also provides in Exhibit B of its comments, an analysis of the results of recognizing the loss on the reacquisition in the year the debt is extinguished. The analysis shows a reduction in earnings of approximately $12.9 million in the first year and an increase in earnings of approximately $2.3 million for each year over the next 34 years. If the losses on the reacquisition were amortized, the analysis shows an increase of earnings in the first year of approximately $1.3 million and an increase in earnings of approximately $1.9 million for each year over the next 34 years.[13]

12. Contel believes that if BellSouth's debt refinancings are completed as projected, they would be in the ratepayers' interest and amortization would properly balance the interests of both the shareholders and the ratepayers.[14] Goldman Sachs argues that any prohibition against amortization would generally result in the telephone company's failure to recover costs unless pass-through of the refinancing costs is allowed in rates.[15] Merrill Lynch alleges that if a company is not allowed to amortize reacquisition costs, the shareholders would bear the adverse effects of recording the loss on the period of extinguishment while ratepayers receive subsequent benefits of lower annual debt costs.[16] Bear Stearns and Southwestern Bell believe that failure to amortize will result in stockholders suffering an unnecessary loss on transactions that were prudent and beneficial to ratepayers.[17] In the face of such an inequity for shareholders, many respondents believe there is no incentive to refinance at lower interest rates.[18]

13. Goldman Sachs states that in its experience, unregulated companies that operate under GAAP are very hesitant to retire high coupon debt unless a very substantial spread exists between the costs of the old debt and the costs of the new debt.[19] Goldman Sachs apparently believes that even if the full costs were passed through to ratepayers in the form of interim rate filings, there would be an inequity because the benefits of refinancing accrue to future ratepayers.[20] Going further, Bear Stearns believes amortization would be appropriate because it prop-

erly reflects the economics of the transaction.[21] Bear Stearns believes that when debt is refunded at a premium in order to take advantages of lower current or future interest rates, the losses should be deferred and charged to the periods benefited.[22]

14. Goldman Sachs notes that interest rates are becoming increasingly volatile and that formal waiver requests might require a considerable length of time for resolution.[23] As a result, Goldman Sachs argues that it would be appropriate for this Commission to establish an expedited waiver policy so that carriers can respond quickly when favorable financial conditions exist. In addition to supporting BellSouth's requests, Pactel suggests that waivers should be available to all carriers, not merely BellSouth, because the petitioning process itself can be a disincentive to refinancing. Pactel believes the waiver process may require the petitioning party to reveal information that may be proprietary. Further, Pactel believes that review of individual petitions will be administratively burdensome and an inefficient use of this Commission's resources.[24]

15. In its reply comments, MCI takes no position on the merits of BellSouth's waiver request. However, MCI disagrees with the Pactel suggestion for a blanket waiver. The waiver practice, according to MCI, more than adequately allows the carriers flexibility to amortize a gain or loss on reacquired debt where such amortization would be prudent and in the public interest.[25] MCI states that a blanket waiver to all carriers, in all circumstances, would serve to allow amortization in situations where it may not be appropriate. MCI instead urges a continuation of the practice of requiring carriers to submit waiver requests.[26]

16. In its reply comments, BellSouth notes that the commenting parties unanimously support the petitions, and that it has been demonstrated that, in certain circumstances, amortization is in the best interest of ratepayers.[27]

V. DISCUSSION

A. Overview

17. In the scenario most of the commenting parties would have us assume, the BellSouth Companies would have only two choices. BellSouth could leave existing high coupon debt in place or it could refinance the existing debt and amortize the losses on reacquisition to future periods. We conclude that BellSouth is not limited to these two choices. There are incentives in place to encourage carriers to refinance existing high coupon debt without amortization and there would still be a benefit to ratepayers and shareholders. We also conclude, after an examination of the nature and effects of debt refinancing transactions, that it would be inappropriate from an accounting or ratemaking point of view to encumber future periods with costs related to debt no longer in existence.

B. Incentives

18. We believe BellSouth and the other parties have overemphasized the incentive that amortization provides. There are other incentives within the realm of our regulation of interstate rates, which would incline carriers to refinance at lower rates. As a practical matter, the embedded cost of debt currently used to calculate the interstate rate of return for the local exchange carriers is an industry-wide average cost.[28] Therefore, it is always advantageous for each carrier to maintain an embedded cost of debt that is less in relation to the industry-wide average. To the degree that a carrier is able to remain below the industry-wide average, it will tend to earn a higher than average return for its shareholders. Conversely, to the degree its cost of debt is above the average, a carrier will tend to earn a lower than average return for shareholders. Thus, any reduction of a company's cost of debt relative to the industry average will benefit shareholders. It should also be remembered that the benefits, relatively speaking, are usually greater for the individual carrier since the benefits to the ratepayer usually are subsumed in the average cost of debt for the entire industry.

19. Moreover, determinations of allowable rates of return often lag behind the refinancing transaction, producing benefits which can be offset against a loss recognized in the period the debt is extinguished. Rates of return based on the higher cost debt that has been extinguished remain in effect while the actual interest costs have been reduced. Thus, in addition to any differential between the industry average and a particular carrier's cost of debt, there is a benefit from the regulatory lag.[29]

20. Basically, the issues here are whether it is appropriate to spread losses on debt reacquisitions to future periods. The major concern is the one-time charge to income. To the extent BellSouth would have this one-time charge to income they would be treated no differently than any nonregulated company. This has been a consistent and strong argument used by the industry whenever this Commission has considered accounting changes which are at odds with GAAP. In fact a significant part of our determination to conform our accounting rules to GAAP[30] was that regulated carriers and nonregulated companies were not treated differently unless there is an overriding public interest determination. Such a determination is not present in this particular case.

21. As a result of the foregoing considerations, we conclude that adequate incentives for refinancing at lower interest rates are present, even in situations when amortization is not allowed.

C. Fairness

22. *The accounting view*. The prevailing guidance for dealing with debt refinancing transactions has been established in APB Opinion No. 26. That opinion expressly prohibits the amortization of gains or losses over future periods.[31] In imposing this requirement, the Accounting Principles Board considered several methods to account for debt reacquisition transactions. In adopting its opinion, the Accounting Principles Board concluded that all extinguishments of debt before scheduled maturities are fundamentally alike and that the accounting for such transactions should be the same regardless of the means used to achieve the extinguishment. The view adopted by the Accounting Principles Board holds that debt is reacquired and refinanced because the market value of the old debt has changed over time to an extent that paying the call premiums on current value is a favorable way to extinguish the debt. These changes in market value occurring over time have not been reflected in the accounts, and as a result, the recorded amount of debt does not reflect the amount at which it can be extinguished. Because the changes have taken place in past periods when the old debt contract was in effect, the entire difference between the carrying value of the debt and the reacquisition price should be recorded when the specific debt

contract is terminated. Moreover, any call premium and unamortized discount or premium is related to the old debt contract and cannot be considered a source of benefits from the new issue. We believe this view is fundamentally sound and when debt reacquisitions are viewed in this light, we conclude that the prescribed GAAP accounting produces equitable results.[32]

23. Moreover, we disagree with Bear Stearns' allegation that amortization would be appropriate because it reflects the economics of the transaction in a regulated environment. The traditional ratemaking treatment would appear to lend credence to this view because it adjusts the cost of debt in the allowed rate of return calculations, thereby producing revenues to "recover" the costs that are deferred and amortized over those future periods. However, the apparent close connection between future revenues and costs to be amortized in future periods does not actually exist. As far as the regulation of interstate rates is concerned, there is a break in the *quid pro quo* connection of these costs with revenues, which does not argue favorably for the amortization of debt extinguishment losses over specific future periods for any carrier. As already noted, cost of debt calculations used in interstate rates of return are based on industry averages, and the revenues produced by industry averages may or may not be sufficient to produce revenues to "recover" losses on the extinguishment of debt over the life of a new replacement issue. When this ratemaking treatment is taken into consideration, the economics of the transaction are considerably different from what Bear Stearns may have presupposed about specific costs being recovered in future periods. This casts another long shadow over amortization, as the appropriate accounting treatment.

24. *The ratemaking view*. The past practice, when approval for amortization was received pursuant to Part 31, permitted carriers to include unamortized discounts and call premiums of the reacquired debt with discounts or premiums on replacement debt issues. Thus, as a matter of actual practice in our interstate calculations, the replacement issue bears not only its own discount or premium but the unamortized premium or discount that relates to the debt it replaces.

25. The true measure of benefits is not related to the total dollar decrease in interest expense over future periods, but in the effect it has on the future cost of debt calculations. Under Part 65 of our Rules, the rate used to determine the debt portion of an authorized rate of return is calculated by dividing the interest plus the amortization amount by the net proceeds. When the unamortized discount related to the old debt is carried into the future, the future debt cost calculation will be higher. For example, if a $1,000 five-year debt issue with a stated interest rate of 8% yielded $960 when placed, the discount would be $40. A portion of this $40 would be attributed to each year of the five year period. Assuming a straight-line method, $8 would be attributed to each year.[33] In order to calculate the debt cost, $8 would be added to the annual interest cost of $80 ($1000 multiplied by 8%) and then divided by the net proceeds of $960 to yield a debt cost of 9.17% ($88 divided by $960). Assuming the issue was a replacement debt issue and the discount included an extra $20 of discount related to the debt it replaced, $12 ($60 divided by 5 years) would be added to the annual interest rate of $80. The sum of $92 ($80 plus $12) would then be divided by the net proceeds of $940 to yield a debt cost of 9.79%.

26. The effects of continuing to encumber future cost of debt calculations with unamortized discounts and call premiums associated with extinguished debt are clear from the example in the preceding paragraph. As a matter of actual practice, the contrast may not be as well defined since it will depend greatly on the relationships of the changes in interest rates to discounts and call premiums associated with the retired debt.[34] Nevertheless, the principle holds and calls into question the wisdom of allowing the practice, even in a rate regulated environment.

D. Conclusion

27. In the BellSouth transactions, nearly all of the circumstances described in the preceding paragraphs are applicable. The amortization proposed is inconsistent with GAAP because it carries forward to future periods costs that more properly would be associated with debt contracts that have been terminated. Furthermore, any link between those costs and revenues of future periods is weak at best. The amortizations proposed by BellSouth would produce lower cost of debt calculations in future periods if amortizations were allowed, but immediate recognition of losses would produce future cost of debt calculations that are still lower because they would not be burdened with old discounts and call premiums.[35]

28. We believe the GAAP position on debt extinguishment and refinancing is sound. Because of our industry averaging ratemaking technique, incentives to refinance when terms are appropriate still exist. When the terms are appropriate, carriers can lower their actual cost of debt in relation to industry average cost of debt and still receive rates of return that have been based, in part, on the higher industry average. In such a scenario it is the shareholder not the ratepayer that reaps the benefit until there is better alignment between the industry average and that carrier's actual debt costs.

29. The accounting prescribed under Part 32 is appropriate and not unfair to either the stockholders or ratepayers. We therefore deny the BellSouth petitions.

VI. ORDERING CLAUSE

30. Accordingly, IT IS ORDERED that BellSouth's Petitions for Waiver of Section 32.4240 of the Commission's Rules to permit amortization of debt refinancing expenses and unamortized discounts and premiums associated with reacquired debt either over the life of the replacement issues or over the remaining life of the called debt issues ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] The reacquisition cost is the amount paid for the early extinguishment before maturity, including any call premium and expense of reacquisition.

[2] The net carrying amount of the debt includes the amount payable at maturity adjusted for any unamortized premium or discount related to the debt as well as any unamortized debt issue costs.

[3] Part 31 was effective through December 31, 1987. It was replaced by Part 32, effective January 1, 1988. Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telelphone Companies, 51 F. R. 24745, July 8, 1986; 51 F. R. 43493, December 2, 1986 (*New USOA), recon. denied in part and granted in part*, 2 FCC Rcd 1086 (1987) (Reconsideration Order).

[4] These GAAP requirements are contained in Accounting Principles Board Opinion No. 26, Early Extinguishment of Debt, which was issued by the Accounting Principles Board in October 1972 (APB Opinion No. 26). The Accounting Principles Board preceded the Financial Accounting Standards Board as the authoritative accounting standard setting body for the American business community.

[5] *Use of Generally Accepted Accounting Principles in Part 32 of the Commission's Rules*, 2 FCC Rcd 6675, (1987) the *Pension and Amortization Order*.

[6] Interested parties were invited to file comments on BellSouth's Petitions for Waiver on or before March 1, 1988, and reply comments on or before March 11, 1988. The following parties filed comments: the Pacific Telesis Group (Pactel); Southwestern Bell Telephone Company (Southwestern Bell); Contel Corporation on behalf of its telephone operating subsidiaries (Contel); GTE Service Corporation and its affiliated domestic telephone operating companies (GTE); and Bear, Stearns & Co. Inc. (Bear Stearns); Goldman, Sachs & Co. (Goldman Sachs); and Merrill Lynch. Reply comments were filed by MCI Telecommunications Corporation (MCI) and BellSouth.

[7] BellSouth has not specified the exact terms of the new debt issues. In each of its petitions, BellSouth has stated it intends to sell debt securities of "up to forty years." BellSouth has also stated that the ultimate sale of any such securities will depend upon numerous factors other than the specific pricing numbers it includes in its petition.

[8] BellSouth states that by disclosing these figures it intends to provide only an example of how the ratepayer could benefit under a particular financing scenario. BellSouth claims that whether or not it actually sells securities in such a situation is a BellSouth management decision and could depend on market conditions and the number of competing issues of comparable size and quality.

[9] Southern Bell estimates that the call premium will be $21.9 million, the debt issuance expenses will be $25,000 and the unamortized balance in the discount account will be $3.7 million. For its two refinancing issues combined, South Central Bell estimates its total costs as follows: the call premiums will be $12.8 million, the debt issuance expenses will be $50,000, and the unamortized balance in the discount account will be $1.8 million. A total of approximately $40.3 million would be amortized.

[10] Southern Bell estimates that the discount on its new issue will be $2 million. South Central Bell estimates that the discounts on its two new issues will total $2.5 million.

[11] BellSouth estimates that Southern Bell's proposed refinancing will reduce fixed charges by approximately $124 million. South Central Bell's proposed refinancing will reduce fixed charges by approximately $76 million ($68 million related to the refinancing of $100 million of 11.88% debentures and $8 million related to the refinancing of $150 million of 10.88% debentures).

[12] BellSouth estimates were prepared before January 28, 1988. *See also* note, 11 *supra*.

[13] Merrill Lynch Comments at 2 and Exhibits.

[14] Contel Comments at 5-6.

[15] Goldman Sachs Comments at 5.

[16] Merrill Lynch Comments at 2.

[17] Bear Stearns Comments at 3; Southwestern Bell Comments at 3.

[18] Goldman Sachs Comments at 5; Contel Comments at 2; GTE Comments at 5; Merrill Lynch Comments at 2; Pactel Comments at 2; Southwestern Bell Comments at 3.

[19] Goldman Sachs Comments at 6.

[20] *Id.*

[21] Bear Stearns Comments at 3.

[22] *Id.*

[23] Goldman Sachs Comments at 8.

[24] Pactel Comments at 2.

[25] MCI Reply at 2.

[26] *Id.*

[27] BellSouth Reply at 2.

[28] *See* 47 C.F.R. §§ 65.300 and 65.301.

[29] We note the Goldman Sachs comment that in its experience any benefit from the regulatory lag would offset only a portion of the losses associated with the reacquisition of the old debt. Nevertheless, it is a benefit which can contribute to a decision by a carrier in determining whether refinancing would be appropriate.

[30] Revision of the Uniform System of Accounts for Telephone Companies to Accommodate Generally Accepted Accounting Principles, 50 F.R. 48408, (November 25, 1985).

[31] *See*, note 4, *supra*.

[32] Even though the Accounting Principles Board (APB) was replaced by the Financial Accounting Standards Board in 1973, the set of Opinions of the APB are still considered to be a primary source of authoritative statements of GAAP.

[33] Part 65 requires the use of a straight-line method. For the sake of simplicity, our example does not include an adjustment to net proceeds for issuance and underwriting expenses which customarily accompany a new debt issue.

[34] It should also be apparent from the example that not all debt reissued at lower stated interest rates will be advantageous. For example, interest rates must drop sufficiently to overcome the added discount from the retired debt. For this reason, we cannot accept the Pactel suggestion for a blanket waiver to allow amortization.

[35] Our own analysis indicates that without amortization of discounts and call premiums associated with the retired debt, debt cost calculations for all three BellSouth issues would be 9.117%. With the amortization they would range from 9.407 to 10.898%.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

BELLSOUTH SERVICES Transmittal No. 215
Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: December 23, 1988; Released: December 23, 1988

By the Chief, Common Carrier Bureau:

1. By the above-referenced transmittal, BellSouth Services (BellSouth) proposes revisions to its tariff for access services to establish Individual Case Basis (ICB) rates and charges for "dry" (or "dark") fiber cable. The revisions are scheduled to become effective on December 30, 1988, on 15 days' notice.

2. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of local exchange carriers' proposed ICB rates for DS3 and DS3-equivalent services.[1] The Bureau released a supplemental Order in the same docket on October 17, 1988, designating for investigation issues regarding whether the provision of dry fiber cable should be distinguished from the provision of DS3 and DS3-equivalent services for purposes of the investigation of the continued use of ICB rates.[2]

3. Since BellSouth's transmittal raises issues currently under investigation in CC Docket No. 88-136, BellSouth's transmittal will be subject to the outcome of that investigation. We also grant BellSouth special permission to advance the effective date of its transmittal.

4. Accordingly, IT IS ORDERED that BellSouth Tariff F.C.C. No. 1, Transmittal No. 215, is subject to the investigation instituted in CC Docket No. 88-136.

5. IT IS FURTHER ORDERED that BellSouth may file tariff revisions, to be effective on not less than one day's notice, in order to advance the effective date of the above-referenced transmittal. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 88-650.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

7. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154 (i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, BellSouth shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for dry fiber cable.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (1988).

[2] Supplemental Order Designating Issues for Investigation, CC Docket No. 88-136, 3 FCC Rcd 6066 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 23, 1988

LOCAL EXCHANGE CARRIERS DIRECTED TO COMPLY WITH PART 69 CONFORMANCE ORDER AND RECONSIDERATION ORDER IN THEIR ANNUAL 1989 ACCESS TARIFF FILINGS

On December 12, 1988, the Commission released an *Order on Reconsideration* (Amendment of Part 69 of the Commission's Rules and Regulations, Access Charges, To Conform It With Part 36, Jurisdictional Separations Procedures, CC Docket No. 87-113, Order on Reconsideration, released Dec. 12, 1988). In the *Order on Reconsideration*, the Commission generally affirmed its earlier *Part 69 Conformance Order* (Amendment of Part 69 of the Commission's Rules and Regulations, Access Charges, To Conform It With Part 36, Jurisdictional Separations Procedures, CC Docket No. 87-113, 2 FCC Rcd 2673 (1987)), which revised Part 69 of the Commission's Rules to conform it to the recently revised Uniform System of Accounts and Separations Manual. The *Order on Reconsideration* also granted, to a limited extent, various petitions for reconsideration and clarification. Local exchange carriers (LECs) are expected to comply fully with the *Part 69 Conformance Order* and the *Order on Reconsideration* in their Annual 1989 Access Tariff Filings scheduled to be made not later than December 30, 1988. However, to the extent that carriers are unable to comply with these Orders, they must, in the Description and Justification accompanying their Annual 1989 Access Tariff Filings, describe their efforts to comply in detail, and explain why such efforts have not yet been successful.

In addition, those LECs who are not able to comply at the time they submit their Annual 1989 Access Tariff Filings on or before December 30, must file complying tariffs at the time to be designated for making errata filings in connection with the Annual 1989 Access Tariff Filing. Alternatively, if a LEC determines that no revisions are necessary, it should submit a statement to that effect (with an accompanying explanation) at the time established for errata filings. The date for errata filings will be established by the Common Carrier Bureau at a later date.

For further information, contact Daniel Grosh at 632-8387 or Mark Uretsky at 632-6550.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-125
Phase II

In the Matter of

Annual 1985 Access Tariff Filings

ORDER

Adopted: December 20, 1988; Released: December 29, 1988

By the Chief, Common Carrier Bureau:

1. On March 9, 1987, the Commission released an Order requiring local exchange carriers (LECs) to refund unlawful Minimum Monthly Usage Charges (MMUCs) and presubscription change charges. Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, 2 FCC Rcd 1416 (1987) (*Terms and Conditions Order*). [1] The date set for refunds was July 7, 1987.

2. On April 8, 1987, MCI Telecommunications Corporation (MCI) filed a petition for clarification or, in the alternative, partial reconsideration of that Order.[2] On April 9, 1987, the GTE Service Corporation (GTE) filed a petition for partial reconsideration, and on June 5, 1987, New York Telephone Company and New England Telephone and Telegraph Company (NYNEX) filed a petition for reconsideration of the *Terms and Conditions Order*. Responsive pleadings have been filed by several parties.

3. On June 26, 1987, the Bell Atlantic Telephone Companies (Bell Atlantic) filed a request for stay of the MMUC refund requirement. In view of these pleadings, the Bureau granted all LECs an extension of time until March 31, 1988, to make refunds of unlawful MMUCs and presubscription change charges in compliance with the *Terms and Conditions Order*. Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, 2 FCC Rcd 7534 (1987). On March 28, 1988, the Bureau extended the effective date of the refunds until June 30, 1988. Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, 3 FCC Rcd 1973 (1988). On June 29, 1988, the Bureau extended the effective date of the refunds until September 30, 1988. Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, 3 FCC Rcd 4063 (1988). On September 23, 1988, the Bureau extended the effective date of the refunds until December 30, 1988. Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, 3 FCC Rcd 5845 (1988).

4. By this Order, we find that additional time is necessary for consideration of arguments raised in the request for stay, the petitions, and the responsive pleadings. Therefore, we hereby grant all local exchange carriers a further extension of time until not later than March 31, 1989, to refund MMUCs and presubscription change charges found unlawful in the *Terms and Conditions Order*. Carriers are advised that the Commission retains its discretion to require payment of interest on any refund amounts.

5. Accordingly, IT IS ORDERED that all local exchange carriers ARE GRANTED an extension of time until not later than March 31, 1989, to make refunds of Minimum Monthly Usage Charges and presubscription change charges as required by the *Terms and Conditions Order*.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] For a summary of the *Terms and Conditions Order*, *see* 52 Fed Reg. 16,388 (1987).

[2] On April 22, 1987, a Public Notice was issued to clarify that filing dates for petitions relating to reconsideration of the *Terms and Conditions Order* would be calculated from the date of the Federal Register summary. Commission Sets Pleading Cycle for Responses to Petitions for Clarification and Reconsideration of 1985 Annual Access Tariff Terms and Conditions Order, Public Notice, released Apr. 22, 1987. As a result of this Public Notice, MCI voluntarily refiled its petition on June 4, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 83-1376

In the Matter of

Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands — RM 4436

SUPPLEMENTAL ORDER INVITING COMMENTS

Adopted: December 19, 1988; Released: January 3, 1989

By the Federal-State Joint Board:

I. INTRODUCTION

A. *Summary*

1. On September 27, 1985, the Federal Communications Commission (Commission) adopted a Notice of Proposed Rule Making (*NPRM*) in the above-captioned proceeding[1] and established this Federal-State Joint Board (Joint Board) pursuant to Section 410(c) of the Communications Act of 1934, as amended (Act). As discussed below, we were asked to consider a variety of questions related to the appropriate market structure for the provision of interstate telecommunication service to Alaska as well as any separations changes that might be required to implement the recommended market structure arrangements for Alaska service.[2]

2. By this Order, we invite interested persons to comment in more detail on several aspects of the issues before us. First, we outline and request comment on five objectives that we believe should guide resolution of the issues in this proceeding. Second, after discussing the market structure proposals presented in the record, we describe two alternative market structure options and seek comment concerning them. We also give parties the opportunity to present additional market structure proposals and to suggest improvements in the current arrangement in case an acceptable alternative is not found. Third, we request comments on certain other issues before us in this proceeding.

B. *Background*

1. *Procedural History*

3. In the *NPRM*, the Commission referred to this Joint Board issues raised by rate integration [3] and the competitive provision of interstate telecommunication services to Alaska. Specifically, we were asked to prepare recommendations concerning: (1) what market structure changes, if any, are necessary to harmonize the Commission's rate integration and competition policies for the Alaska interstate telecommunication market; and (2) what, if any, separations or other rule changes would be necessary to implement the recommended market structure. In light of the high cost of service, we were asked to study the need for cost support in order to assure universal service in Alaska, and to consider alternative sources for such support. The following issues are also before this Joint Board for consideration: (1) the appropriate separations procedures for the Alaska exchange carriers' ownership interest in bush earth stations;[4] and (2) the provision of service on the Alaska-Hawaii route, as well as the applicability of rate integration to this service.[5]

4. On May 9, 1986, we issued an order requesting that interested persons submit information and data concerning the provision of telecommunication services within the State of Alaska and between Alaska and the contiguous states.[6] Specifically, we requested data identifying:

> (1) the costs associated with Alaska's interstate and intrastate telecommunication services in order to determine the extent to which these services are characterized by high costs; (2) the location of those costs within the network hierarchy to permit the evaluation of cost allocation, market structure, or separations alternatives; and (3) the cost of the various interstate and intrastate service offerings of the Alaska carriers to allow evaluation of the market structure proposals.[7]

On July 15, 1986, data were filed by the State of Alaska (Alaska), the American Telephone and Telegraph Company (AT&T), Alascom, Inc. (Alascom), General Communication Incorporated (GCI), and the Alaska Telephone Association (ATA).[8] Market structure proposals for Alaska and/or comments were filed by interested parties on December 2, 1986.[9] Opposition comments and reply comments were filed on February 27 and March 27, 1987, respectively.[10] Subsequently, a number of supplemental filings were made, and several of them generated responsive comments.[11] These filings are listed in Appendix A.

5. Issues concerning the provision of Alaska-Hawaii service and the appropriate rate structure for these offerings were initially raised in an April 4, 1986, Alascom petition requesting that the Commission direct AT&T to continue providing Alaska-Hawaii MTS and WATS service in conjunction with Alascom. After AT&T and Alascom reached agreement on interim measures for the provision of this service, to be effective through December 31, 1987,[12] AT&T and Alascom requested that these issues be considered in this proceeding. On December 30, 1986, the Commission adopted a *Supplemental Notice* referring the issues of appropriate service provisioning arrangements on, and rate structure for, the Alaska-Hawaii route to this Joint Board. Comments in response to the *Supplemental Notice* were filed on February 10, 1987.[13] Opposition comments and reply comments were filed on March 10, and March 31, 1987, respectively.[14]

6. We are also considering questions related to the separation of Alaska bush earth station costs. In the 1986 Reconsideration Order in the *Bush Earth Station Ownership* proceeding,[15] the Commission approved interim use of Alascom's CMM (conversation minute mile) factor in the separation of Alaska exchange carriers' investment and expenses associated with bush earth stations. In doing so, the Commission noted that separations issues relating

to the allocation of bush earth station investment and expenses were being considered by the Joint Boards in CC Docket Nos. 80-286 and 83-1376.[16] Since the CC Docket 80-286 Joint Board has not specifically addressed this issue, we will consider it in this proceeding.

2. *Existing Market Conditions and Structure*

7. The State of Alaska has the lowest population density of any state, with a land area encompassing approximately 591,000 square miles and a population of approximately 500,000. Nearly one-half of the residents live in Anchorage; and only two other cities, Fairbanks and Juneau, have more than 10,000 residents. Seventy-seven percent of the communities in Alaska have 500 or fewer residents, with one-third of the communities having fewer than 100 residents.[17] In addition, Alaska has a per capita cost of living that is substantially above the national average, as well as a high per capita income.[18] Census Bureau data showed that 87.2% of Alaska households had telephone service as of March 1988.[19]

8. Twenty-three exchange carriers provide local service in Alaska,[20] serving approximately 246,000 access lines in about 250 exchanges.[21] Equal access is available in most, if not all, of those Alaska exchanges directly served by competitive carriers. Alascom provides interexchange service within the state, while interstate service to and from Alaska is provided by two facility-based carriers--Alascom and GCI. A limited number of resale carriers also provide Alaska interstate service. In order to facilitate understanding of the market structure issues presently before us, the operations of Alascom and GCI are described below.

a. *The Alascom Operation*

9. Alascom, a dominant carrier under the Commission's rules,[22] provides both interstate and intrastate long distance service over a mix of owned and leased satellite, microwave, and cable facilities located in Alaska, the contiguous states, and Canada. Alascom provides interstate MTS and WATS service in conjunction with AT&T pursuant to a joint service arrangement implementing rate integration.[23] The joint service settlements formula provides that Alascom is to be compensated for all of its interstate expenses and provided with a return on its interstate investment equal to that earned by AT&T.[24] Alascom's interstate expenses and investment are determined in accordance with the separations procedures contained in Part 36 of the Commission's rules.[25]

10. In providing message service between Alaska and the contiguous states, Alascom interconnects its satellite facilities with AT&T's network at two earth stations it leases in California. It connects its microwave facilities, which traverse Canada, with AT&T's network at a point on the U.S.-Canadian border in the State of Washington. Communication signals between Alaska and the contiguous states are transmitted via Alascom's Aurora satellite, AT&T's Telstar satellite, or microwave facilities to and from gateway entry locations at Anchorage, Fairbanks, or Juneau. Each gateway location has at least two earth station antenna systems and a Class IV entry switch. Almost all of the interstate message traffic passes through one of these switches to reach Alaska exchange carrier facilities.[26]

11. Alascom and AT&T provide joint interstate MTS and WATS service pursuant to the Commission's rate integration policy. To implement that policy, AT&T files tariffs covering northbound service offerings, and Alascom files tariffs covering southbound service offerings. Each concurs in the other's interstate MTS and WATS tariffs, which charge fully-integrated rates for calls between Alaska and the contiguous states.[27] Interstate private line services are offered on an "end-on-end" basis, with each carrier developing separate rates for the portion of the circuit it provides based on its own costs.

b. *The GCI Operation*

12. GCI, a nondominant carrier under the Commission's rules, provides interstate message and private line services through a satellite-based network of its own. It also uses access service obtained from other carriers. Its interstate message services consist almost exclusively of southbound offerings, although it terminates some northbound traffic for other competitive IXCs, and offers a travel feature that can be used to make both southbound and northbound calls. GCI competes with Alascom in the provision of interstate service to more than two-thirds of the access lines in Alaska.[28] While it is not presently authorized to provide intrastate service in Alaska, GCI has filed an application for such authority with the Alaska PUC. GCI is also associated with an applicant for a mobile satellite system.[29]

13. GCI owns two satellite transponders on an American Satellite Corporation satellite, and provides interstate service via four principal earth stations located at Eagle River (near Anchorage), Fairbanks, and Juneau, Alaska, as well as Issaquah (near Seattle), Washington. It also owns a mobile earth station and several other earth stations in smaller population centers in Alaska.[30]

14. GCI obtains access from Alaska exchange carriers and leases lines from Alascom, when necessary, for the origination and termination of its traffic in Alaska. In the Seattle area, GCI terminates its traffic over access facilities obtained from the exchange carriers, or via intrastate toll services obtained from Pacific Northwest Bell or AT&T. To distribute its Alaska-originated traffic in the remainder of the contiguous states, it primarily uses facilities obtained from AT&T pursuant to the Carrier Lease Agreement.[31] That agreement provides GCI with a digital interface at an AT&T Class IV switch in Seattle, and allows GCI to obtain a specified number of circuits, described as "base circuit terminations," at AT&T's average cost of exchange access. GCI uses these circuits for the termination of its Alaska originated message traffic in the contiguous states. GCI is also allowed to obtain additional circuits from AT&T at Megacom tariff rates. The number of base circuits available to GCI under the agreement increases until October 1988, after which time the number declines through 1992 when the Carrier Lease Agreement terminates.[32]

II. OBJECTIVES

A. *Introduction*

15. In this section, we discuss the fundamental objectives that we have tentatively selected to apply in developing our recommendations, and request comment on these goals. The Commission described a number of

these concerns in the *NPRM* referring these issues to us. Among other things, the Commission stated that it did not propose to abandon rate integration, noting that the principles underlying this policy remain valid.[33] The Commission also asked us to consider the efficiency of alternative market structures, adding that we should avoid approaches that create incentives for uneconomic facility duplication. In addition, the Commission asked that we bear in mind the high cost of serving portions of the Alaska market. It also stated that Alascom's state-wide service obligations should be a significant factor in evaluating the public interest considerations raised by the parties. In addition, the Commission emphasized that we should consider the effect of any proposed market structure on intrastate rates.

16. The comments filed to date in this proceeding reveal differences in the parties' perspectives on the objectives that should be the focus of this proceeding, and on what these objectives mean for resolution of the issues before us. Given the importance that our choice of objectives will have in guiding resolution of the issues before us, we believe that this matter merits a further opportunity for comment by interested parties.

B. Comments of the Parties

17. Alascom emphasizes the importance of rate integration and universal service, arguing that the existing joint service arrangement must be continued in order to ensure achievement of these goals. Alascom argues that the status quo has provided a functioning, proven structure which has allowed Alaska the benefits of universal service, integrated rates and competition. Alascom also contends that allegations of inefficiency generated by the present market structure are unsubstantiated though it could take steps, in conjunction with AT&T, to reduce costs. It is argued that any losses to AT&T under the current system are exaggerated, trivial compared to AT&T's overall operations, and are compensated for by nationwide rate averaging. Alascom suggests in its comments that deviation from the status quo could set precedents regarding the treatment of high cost areas of the nation that could ultimately lead to nationwide toll rate deaveraging. Alascom does not oppose competition in the provision of Alaska interstate service under the current market structure, but argues that new entrants should be required to compete against integrated rates without cost assistance, just as competitive entrants do in the contiguous states.

18. AT&T states that its settlements with Alascom currently exceed the two way revenues for Alaska interstate message service, and emphasizes the importance of measures designed to promote efficiency and reduce the cost of Alaska interstate services. It argues that the current arrangements foster inefficiency, and it proposes an alternative market structure that it believes will create appropriate incentives. Among other things, this plan would allow AT&T to enter the Alaska interstate market directly, rather than through the existing joint service arrangement.[34] AT&T also argues that support for Alaska costs is necessary to ensure universal service only in the case of rural or bush high cost areas. It supports measures to reassign approximately $40 million in revenue requirements from interstate message services to the interstate private line service category and the intrastate jurisdiction, taking the position that these costs can be recovered without undermining universal service. AT&T also argues that, in light of the divestiture of the Bell System under the Modification of Final Judgment, AT&T can no longer afford to support the high cost of Alaska service under the current structure for rate integration. Therefore, it suggests establishing a pooling mechanism to spread some of the cost of serving rural Alaska among all IXCs.[35] If such a system is not adopted, AT&T argues that the rates for message services to rural areas in Alaska must be allowed to rise.

19. GCI emphasizes the need for market structure changes to facilitate competition, arguing that this will foster efficiency and reduce costs. Like AT&T, it advocates termination of AT&T-Alascom joint services and proposes an alternative market structure designed to achieve these objectives.[36] GCI also proposes measures to ensure universal service and continued rate integration, as well as targeted support for high cost rural areas.[37] GCI opposes measures to shift costs to the intrastate jurisdiction, and advocates a freeze on the intrastate MTS cost assignment.

20. NTIA in its comments supports a goal of bringing the benefits of competition to the Alaska market. Thus, it argues that this Joint Board must develop a support mechanism that ensures affordable rates for Alaska service without hampering competitive entry.

21. Alaska emphasizes the uniqueness of the Alaska market, arguing that the low population density, vast distances, and the lack of transportation make affordable communications particularly important for its citizens. It contends that the Communications Act and the critical necessity of telephone service in Alaska require that we treat universal service as the fundamental goal of this proceeding. Accordingly, it asks this Joint Board to recommend a market structure that is compatible with designation of a carrier of last resort and provides affordable rates for both interstate and state interexchange service. Alaska also reaffirms its position concerning the overriding importance of rate integration. Like Alascom, Alaska contends that AT&T revenue-to-cost shortfalls in the Alaska market are balanced by its provision of service at averaged rates in low cost areas of the nation. Alaska states that rate integration in Alaska should be achieved as is done in other high cost portions of the nation through revenue and cost sharing. Alaska argues that treating Alaska differently from the rest of the nation will cause a precedent for "special treatment" in other high cost locations leading to nationwide rate deaveraging. In addition, Alaska expresses concern that a change in the Alaska market structure could produce additional undesirable results, including stranded investment, shifts in jurisdictional cost allocations, and unaffordably high intrastate rates.

22. ATA and ATU support continued rate integration and oppose measures to reallocate costs to the intrastate jurisdiction. ATU argues that continuation of the Ozark procedures for an additional five year period is necessary to allow Alaska to achieve the level of telephone service found in the contiguous states.

23. Hawaii states that it takes no position on the resolution of Alaska issues but that the resultant Alaska decision should apply to the Hawaii/Alaska route. Hawaii supports rate integration and opposes the AT&T position that rate integration need not be provided between Hawaii and Alaska.

C. *Discussion*

24. Based on a review of the comments filed to date in this proceeding, the guidance contained in the *NPRM*, and a review of fundamental Commission policy established in prior proceedings, we have tentatively identified the following five objectives which we believe should guide our resolution of the issues in this proceeding--preservation of universal service, continuation of rate integration, market based competitive entry, increased efficiency, and jurisdictional revenue requirement neutrality. The delineated order of the objectives in this discussion should not be construed to indicate prioritization of the goals by this Joint Board. In our view, a proper resolution of the issues before us must represent a balanced effort to achieve each of these goals. In particular, we emphasize that measures to increase efficiency and promote market based competitive entry should not be implemented at the expense of universal service, rate integration or revenue requirement neutrality. Each of our proposed objectives is discussed separately below. In light of the fact that the Commission has asked us to prepare recommendations designed to harmonize rate integration and competition in the provision of Alaska interstate service, we will begin with a discussion of these two objectives.

1. *Continuation of Rate Integration*

25. In the *NPRM*, the Commission endorsed the principle of rate integration, while indicating that we should consider alternative implementation arrangements if necessary to harmonize rate integration and competition policies. With the exception of AT&T, all of the parties strongly endorsed continued rate integration for message services. AT&T, however, expresses reservations concerning its ability to continue to support full rate integration for rural areas absent a high cost fund. Based on the record in this and prior proceedings concerning rate integration, we tentatively conclude that continued integration of interstate MTS and WATS rates[38] is necessary to ensure that all Alaska residents are able to participate fully in the social, economic, and political life of our nation.[39] We also believe that a rate structure which averages interstate toll rates for states other than Alaska, while imposing deaveraged rates for service to and from Alaska could raise questions concerning an unjust and unreasonable discrimination pursuant to Section 202 of the Act.[40] We therefore propose to develop an Alaska market structure recommendation that provides for the continued availability of interstate MTS and WATS service at integrated rates for all Alaska residents.

2. *Market Based Competitive Entry*

26. The Commission authorized competitive entry in the Alaska interstate MTS and WATS market for non-bush locations in 1982,[41] without adopting any Alaska-specific provisions for the treatment of competitive entrants.[42] Here, we are examining the market structure rules applicable to the provision of Alaska interstate service on a competitive basis. The FCC has found in many of its previous proceedings that a market based competitive entry policy for the provision of interstate service, allowing competitors to enter the market, with their success or failure determined by marketplace performance has provided substantial benefits in the contiguous states.[43] The success of such a policy, of course, requires providing a full and fair opportunity for new entrants to compete. It is the desire of this Joint Board to promote in Alaska the benefits associated with a policy of free market competition. Accordingly, we tentatively conclude that the recommended Alaska interstate market structure should allow for market based competitive entry.

27. Under this approach, new entrants would compete with AT&T's nationally averaged interstate rates, as carriers do in the contiguous states. While competitive IXCs would be allowed to enter the Alaska interstate telecommunication market just as they are allowed to do in the contiguous states, we do not believe that competition is required on every route. Routes that will not support a competitor without a subsidy or other rate support would, of course, continue to be served by a monopoly provider.[44] Thus, we tentatively conclude that rate support or other special treatment should not be made available to competitive entrants in the Alaska interstate market. Among other things, the provision of assistance to competitive entrants sends improper economic signals and could lead to the building of uneconomic duplicative facilities, thereby impairing efficiency.

3. *Preservation of Universal Service*

28. This Joint Board is firmly committed to ensuring universal service for Alaska as part of our deliberations in this docket. Nationwide universal service is one of the objectives of the Communications Act,[45] and has served as a specific Commission and Joint Board objective in other proceedings, including those involving the allocation and recovery of local exchange costs. In furtherance of this nationwide policy, the Joint Board in CC Docket Nos. 78-72 and 80-286 recommended, and the Commission adopted, measures establishing a universal service fund to assist subscribers in areas where the cost of local exchange service is particularly high,[46] and two federal lifeline assistance programs for low income telephone subscribers.[47] These programs are available throughout the United States, including Alaska, upon adoption of implementing measures by exchange companies and the state. A number of the parties commenting in response to the *NPRM* state that the maintenance of universal service in Alaska should be a principal concern.

29. Previous Joint Board and Commission discussions of universal service have concentrated on subscription to local exchange services.[48] Alascom argues that the concept of universal service must encompass access to toll services if it is to be meaningful for Alaska. Alascom says a carrier of last resort should be designated for the provision of interexchange service.[49] Alaska also advocates a market structure that allows for an interexchange carrier of last resort.[50] Essentially, all customers served by an exchange carrier in the contiguous states have access to interexchange service.[51] We believe that this should be the case for Alaska subscribers as well. Given the high cost of interexchange service to certain portions of Alaska, we tentatively conclude that it would be prudent to ensure that the measures adopted in this proceeding include designation of a carrier of last resort for Alaska message service.

30. The carrier of last resort will be responsible for building necessary facilities and providing service under the market structure rules adopted in this proceeding. Typically, the facilities involved will be used jointly in the

provision of both intrastate and interstate message services. As such, the Alaska PUC, this Joint Board, and the Commission have a role to perform. We would anticipate that the carrier with statewide service obligations would serve as the carrier of last resort. Alascom, as the only carrier currently authorized to provide intrastate toll service, presently fulfills this function.

4. *Jurisdictional Revenue Requirement Neutrality*

31. The record compiled in this proceeding indicates that the adoption of certain market structure alternatives could result in a shift in revenue requirements to the intrastate jurisdiction as well as shifts between the switched and private line service categories.[52] In addition, AT&T advocates specific separations changes that would reassign approximately $40 million in revenue requirements from interstate message services to the intrastate jurisdiction and the interstate private line category.[53] These proposed changes could increase significantly Alascom's intrastate revenue requirement, and undermine the affordability of intrastate MTS service.[54] We do not believe that the record demonstrates that the Alaska intrastate cost assignment is disproportionately low and thus should be increased.[55] Furthermore, the telephone industry is currently in the midst of several other multi-year transitions implementing separations changes in the allocation of local loop[56] and central office costs,[57] which could involve significant jurisdictional cost shifts for certain local exchange carriers in Alaska. There are a number of other issues under consideration in CC Docket No. 80-286 which could also result in additional revenue requirement shifts.[58] Accordingly, we tentatively conclude that resolution of the issues in this proceeding, including adoption of any changes in the Alaska interstate market structure, should be accomplished without generating any material increase in the intrastate revenue requirement.[59]

32. Support of our objective of revenue requirement neutrality warrants that the Alaska-specific separations changes proposed by the parties in this proceeding in order to reassign costs to the intrastate jurisdiction not be adopted. By adopting a revenue requirement neutrality principle in this proceeding, our attention, as well as that of the commenting parties, can be focused on the overall merits of alternative market structures. However, intrastate revenue requirements could increase due to factors not directly at issue in CC Docket 83-1376. Among other things, regulatory action on separations issues in other proceedings could affect the intrastate revenue requirement for Alaska as well as other states.[60]

5. *Increased Efficiency*

33. The present market structure arrangements in Alaska originated in the early 1970's when the provision of interstate MTS and WATS service was a *de facto* monopoly. Periodic reexamination of such arrangements to determine whether they remain efficient is essential. In this proceeding, AT&T and GCI argue that the current Alaska interstate market structure creates incentives for inefficiency, and they advocate changes designed to address this problem. We believe that such a reexamination is particularly important in the case of Alaska since the overall cost of service for this state is high. The creation of an efficient telecommunication network is one of the goals of the Communications Act.[61] Efficiency and innovation in the provision of telecommunication service are longstanding concerns of the Commission, and the Joint Boards, as well as state regulators. These are not merely theoretical issues since they affect the cost of service, and consequently the rates paid by all subscribers. Improved efficiency could lead to a reduction in total Alaska service cost and possibly a reduction in the level of interstate cost support. Accordingly, we tentatively conclude that the public interest will be served by the adoption of the most efficient Alaska telecommunication market structure possible, consistent with our other public interest concerns. As discussed in more detail in the following section, a market structure involving the provision of service on a cost-plus basis produces few, if any, incentives for cost control or efficiency. We also emphasize that a market structure that encourages the building of uneconomic facilities by competitive entrants undermines economic efficiency.

D. *Conclusion*

34. We believe that these objectives will provide a sound basis for evaluating proposals for restructuring the provision of Alaska interstate service. However, we recognize that these objectives and the relative weight that we propose to accord each of them differ in certain respects from the goals advocated by certain of the parties to this proceeding. Accordingly, interested parties are requested to comment on these objectives and their use as the standards for evaluating alternative market structure proposals for the provision of Alaska interstate telecommunication service and for making any changes to the Commission's rules that may be required.

III. MARKET STRUCTURE AND COST ALLOCATION ISSUES

A. *Introduction*

35. This proceeding focuses, in large measure, on possible changes in the market structure for the provision of Alaska interstate service. Questions concerning the need for separations changes in conjunction with possible market structure revisions are also before us. In this section, we review the comments concerning these issues and discuss the market structure and cost allocation proposals offered by AT&T, Alascom and GCI. After reviewing various concerns with each of these proposals that lead us to conclude that they cannot be adopted as proposed, we present two alternative market structure proposals of our own and an opportunity to comment on the need for cost adjustment mechanisms. Following the discussion of our alternative market proposals, we request comments concerning the benefits and detriments of adopting either plan relative to the existing joint service arrangement in light of our basic objectives in this proceeding. While it is our preliminary opinion that changes are necessary in the existing market structure for Alaska, we will carefully evaluate the record compiled in response to this Order to ensure that any recommended revisions in market structure will in fact improve the method of providing Alaska telecommunication service and promote the achievement of the objectives identified earlier in this Order.

36. By proposing Plans A and B, we are not foreclosing consideration of other alternatives or of variations of alternatives described in this Order. However, any modifications and/or alternatives to the proposals at hand will be deemed worthy of further consideration only if supported with sufficient detail; identification, and when revelent, quantification of the benefits and detriments of any alternative proposal; and production of data and other analysis comparable to that requested for Plans A and B. Parties supporting alternative proposals should show how those plans eliminate, reduce, or provide fewer internal deficiencies than those that may exist under Plan A, Plan B, and the joint service arrangement. Parties should consider this to be their final opportunity for presentation of new market proposals.

37. Finally, analysis of the above plans necessitates our request for additional data from interested parties. We will further clarify the nature of these data requests later in this Order.

B. *Comments*

1. *AT & T*

38. AT&T argues that the present market structure for Alaska interstate service is highly inefficient, and places unfair burdens on AT&T and its customers. In particular, AT&T alleges that the existing joint service arrangement encourages Alascom "to manage for maximum subsidy rather than for network efficiency . . .," [62] a result contrary to the public interest. AT&T further argues that the present settlements formula for joint AT&T-Alascom services requires an unlawful division of charges contrary to Section 201 of the Act. AT&T contends that the formula violates Section 201 because it must pay Alascom compensation in excess of the two way revenues for Alaska interstate message service. In addition, AT&T contends that the high cost of serving rural areas in Alaska can no longer be supported through averaging of its interstate toll rates. Accordingly, AT&T proposes an alternative market structure for Alaska interstate service that eliminates joint offerings, establishes an Alaska Rural Fund to redistribute the cost of service to rural areas among all IXCs, and changes jurisdictional separations rules to reduce the costs assigned to Alaska interstate message services.

39. Under AT&T's proposal, any carrier that wishes to enter the Alaska interstate market directly would be allowed to do so by establishing a point of presence (POP) in Alaska. Alascom would be required to make its facilities for the distribution of traffic within Alaska available to all entrants on a non-discriminatory basis. Carriers entering the Alaska interstate market would also be allowed to interconnect directly with the exchange carriers without using Alascom's services.

40. Under such a competitive scenario, AT&T indicates that it would not expect to offer joint service with Alascom, as it does now. Instead, AT&T indicates that it would consider establishing one or more POP in Alaska, and interconnecting directly with the exchange carriers in Anchorage, Fairbanks, and Juneau.[63] However, AT&T states that it would be willing to lease existing facilities from Alascom during a transition period if the Alascom rates were reasonable. AT&T also states that it does not propose to provide Alaska intrastate service; instead, Alascom would continue to provide intrastate interexchange service. GCI would also continue to compete in the Alaska interstate market under this proposal, and AT&T advocates retention of its existing arrangements with GCI.

41. AT&T also argues that much of the support that it provides for services in the Alaska market--$97 million by its estimate[64]--can be eliminated without undermining universal service. AT&T contends that service to the urban areas in Alaska does not necessarily involve high costs and should not be accorded special treatment. Accordingly, it proposes separations changes designed to transfer approximately $40 million in revenue requirements from interstate message services to the intrastate jurisdiction and the interstate private line category. AT&T would achieve this result by establishing two Alascom study areas to eliminate the distance sensitive allocation of satellite costs. AT&T contends that these costs can easily be recovered from interstate private line service and intrastate sources such as short-haul toll and operator services, as well as state private line services, without undermining universal service or producing inordinately high intrastate toll rates. AT&T proposes the establishment of an Alaska Rural Fund to cover $39 million in Alaska service costs. It argues that this support for Alaska services should be funded from tax revenues, adding that if support is instead generated through telecommunication service pricing, the costs involved must be borne by all IXCs.[65]

42. Overall assistance would be set at current support levels to foster efficiency, and a capped assistance amount would be developed for each high cost route in order to target support to the areas that need it. Facility-based carriers serving these points would be eligible to receive payments from the Fund, based on their relative share of traffic on these routes. AT&T recommends phased elimination of the assistance for Alaska as technological and other changes obviate the need for it.

43. AT&T strongly opposes continuation of the existing joint service arrangement with Alascom. If that arrangement is retained, however, AT&T argues that it must be given much greater control over Alascom's expenditures for the provision of interstate services.[66] AT&T also opposes GCI's proposal that the carrier common line charge (CCLC) for high cost rural areas in Alaska be eliminated, [67] arguing that this will not produce sufficient support.

2. *Alascom*

44. Alascom argues that continuation of the current arrangement for the provision of Alaska interstate message service, with its cost and revenue pooling, is necessary to guarantee continued rate integration. Alascom contends that allegations of inefficiency in its present operations by AT&T and GCI have not been substantiated. It also observes that Alaska is not the only area where the cost of interstate message service exceeds revenues, arguing that this is the case in certain areas in the contiguous states as well.[68] Alascom argues that allowing AT&T to build facilities in Alaska would not increase efficiency. Instead, it states that this would increase the total cost of Alaska service, thereby reducing efficiency, and leaving Alascom's current network with the same costs, but greatly reduced revenues. Alascom also contends that AT&T's proposal to create an Alaska access area is inconsistent with Alascom's statewide network design that is predicated on full MTS and WATS rate integration, with service provided in partnership with AT&T.

45. Alascom alleges that AT&T wants to interconnect with it in Alaska in order to reassign costs to the intrastate jurisdiction.[69] Contrary to AT&T, Alascom argues that this reallocation of costs is unnecessary, stating that the current cost to AT&T of rate integration for Alaska is less than 0.5% of AT&T's interstate revenues or less than six cents per month per access line.[70] Alascom also notes that there is no evidence that this level of support for rate integration will cause uneconomic bypass. It submits that Alaskans already face relatively steep toll charges on all but the shortest mileage bands.[71] Alascom also submits that it can take additional steps, with AT&T's assistance, to reduce the cost of the Alaska network. It asserts that these measures should be carefully explored before market structure or separations changes are considered. Alascom also emphasizes that changes in separations procedures should not be made without careful consideration of the effect on intrastate rates. It also states that if this Joint Board should recommend separations changes, the proposal should include a five-year transition period to allow Alascom adequate time to adjust to the increased intrastate revenue requirement.

46. Alascom contends that continuation of joint services and rate integration are compatible with a competitive environment, but emphasizes that competitive entrants in the Alaska interstate market must be subject to the same market rules as nondominant competitive entrants (other common carriers or OCCs) in the contiguous states. It contends that the Carrier Lease Agreement between AT&T and GCI is unlawfully preferential and denies other OCCs an opportunity to compete fairly in the Alaska interstate market.[72] Alascom also alleges that the Carrier Lease Agreement promotes uneconomic facility duplication by GCI and notes that this agreement gives GCI a cost advantage that has allowed it to obtain almost 30% of all southbound Alaska interstate traffic.[73] As a result, Alascom argues that the benefits that GCI receives from AT&T pursuant to the Carrier Lease Agreement must be terminated. Alascom also argues that its state-wide service obligations, when contrasted with GCI's status as a nondominant carrier with substantial regulatory flexibility, provides a sound basis for treating the two carriers differently.

3. *GCI*

47. GCI recommends elimination of joint services. It says that the joint service arrangement fosters inefficiency by compensating Alascom on a cost-plus basis. In particular, GCI contends that the present Alascom system has unused satellite capacity and multiple earth stations for individual service areas. It also argues that Alascom's system for providing interstate service to rural Alaska is very inefficient.[74] GCI contends that a more competitive market structure would increase incentives for efficiency. Accordingly, it proposes a plan which would require AT&T to assume responsibility for ensuring universal service to and from Alaska at integrated rates. AT&T would be allowed to provide this service directly over its own facilities or to obtain service from the carrier of its choice. Under this market structure, GCI assumes that AT&T would serve urban areas directly and seek competitive bids for service to rural areas rather than automatically using Alascom facilities.

48. GCI also proposes a new network structure for the provision of service to rural areas in Alaska.[75] This GCI network would be almost entirely satellite-based[76], and, according to GCI, could be constructed for under $100 million, with direct operating costs of less than $30 million per year. GCI asserts that if AT&T entered Alaska's urban markets on its own facilities and accepted GCI's proposal for rural service, AT&T could reduce its deficit for service to and from Alaska by almost two-thirds.[77]

49. GCI also recommends freezing the existing assignment of costs to intrastate MTS in order to ensure that market structure changes would not produce undesirable cost allocation changes. As a further protection, it proposes that AT&T be required to purchase Alascom facilities that become surplus due to implementation of market structure changes. GCI also argues that its Carrier Lease Agreement with AT&T should remain in effect as a transitional mechanism until competition and technological innovation remedy the high-cost problem, with Alascom as well as GCI receiving base circuits under the terms in the Carrier Lease Agreement.[78] According to GCI, this will allow competition to continue in the Alaska interstate market pending decreases in the cost of contiguous states traffic distribution.[79]

50. If a unique high cost assistance mechanism is required to support Alaska service, GCI believes that it should be competitively neutral, with the costs involved recovered from all IXCs, not solely AT&T. GCI suggests that any such subsidy be provided by reducing interstate access charges in non-urban Alaska exchanges through waiver of the Carrier Common Line (CCL) charge. This revenue shortfall would be borne by all IXCs through increased charges for access elsewhere in the country. GCI notes that as the CCL charge declines, the amount of the subsidy will decrease.[80]

51. GCI contends that its proposal would lead to a number of benefits including: (1) fully integrated interstate message toll rates; (2) a reduced need for support for Alaska costs over time due to competitive forces; (3) less need for Commission oversight; and (4) increased competition in both rural and urban markets.[81] GCI argues that, in contrast to this, Alascom's proposal is designed to achieve only one objective--universal service--at an extraordinarily high cost to AT&T ratepayers in the contiguous states, and at the cost of competition and increased efficiency in the Alaska interstate market.

4. *Alaska*

52. Alaska focuses on the importance of assuring universal service and continued rate integration, stating that any proposed market structure or separations changes must promote these goals.[82] As a result, Alaska strongly opposes AT&T's plan to reassign approximately $40 million in costs from interstate message services to the intrastate jurisdiction and interstate private line services, arguing that this constitutes discrimination against Alaska. It emphasizes that the separations rules are not based solely on cost causation principles, stating that these rules also reflect public policy concerns with the protection of universal service and the development of a national telephone network. Alaska argues that the amount of support for Alaska telecommunication service is negligible when compared to AT&T's overall revenues, while Alaska subscribers would be subjected to considerable hardship if this support were withdrawn. Alaska states that the es-

sence of rate integration is that geographically averaged rates are set at levels necessary to generate sufficient revenue to cover the cost of providing service to all portions of the United States, not each and every portion by itself. To that end, Alaska submits that the state should not be considered a separate interexchange market. Alaska submits that AT&T is permitted to charge rates that are higher than costs for low cost routes because it charges the same rates, which are lower than costs, for high cost routes of comparable length. It states that there is no evidence that AT&T has suffered financially from its support of rate integration and universal service in Alaska. Alaska also asserts that changes in the separations rules would be inequitable because sizable investments have been made by Alascom and Alaska exchange carriers with the Commission's encouragement based on the existing rules.[83]

53. Alaska emphasizes that it would have serious concerns if AT&T were allowed to establish a POP in Alaska, particularly if this would increase intrastate revenue requirements.[84] Alaska also opposes establishing an Alaska Rural Fund as proposed by AT&T, arguing that there is no reason for an Alaska Fund when nationally averaged rates are achieved in the contiguous states without such a mechanism. Alaska also criticizes the complexity of the route-specific cost allocation procedures required to implement AT&T's Alaska Rural Fund.

5. *NTIA*

54. NTIA recommends measures designed to bring the benefits of competition to Alaska. Accordingly, it states that we should find a mechanism to ensure affordable rates in Alaska without impairing the efforts of competitors to bring additional telecommunication services to Alaska residents.

6. *ATA*

55. ATA supports full rate integration, and asserts that Alaska deserves special consideration in the development of separations procedures. It contends that Alaska telephone service has grown slowly because Alaska exchange carriers did not obtain the benefits of the Ozark separations procedures until five years after they were applied in the contiguous states.[85] It argues that the unique characteristics of the Alaska market mandate continued use of distance-sensitive separations procedures.[86] In its reply, ATA indicates that the changes in the separations procedures for Central Office Equipment recently adopted by the Joint Board in CC Docket No. 80-286 address the concerns of most of its member companies.

7. *ATU*

56. ATU also supports rate integration, arguing that Alaska has many unique characteristics that make dependable telecommunication service at affordable rates particularly vital. It also supports continued application of the Ozark separations procedures to Alaska. In the absence of this, ATU emphasizes that a high cost fund must be established to ensure universal service by minimizing the effect of separations changes and the loss of revenues due to rate integration.

C. *Discussion*

57. We have reviewed the market structure proposals made by AT&T, Alascom and GCI, as well as the other comments filed in this proceeding and conclude that each of the proposals has one or more features that makes it incompatible with the proposed objectives of this Joint Board. Therefore, we tentatively conclude that none of the market structures proposed to date in this proceeding should be adopted without modification. However, elements of some of the proposals are incorporated into one or more of our plans presented for comment herein. In this section, we identify the major features of each of these market structure proposals that we find incompatible with our stated objectives, and therefore undesirable as part of a revised interstate market structure for Alaska. Since we are seeking further comment on the market structure and cost allocation issues, we do not discuss all of the details of the existing proposals herein.

58. The present arrangement between AT&T and Alascom raises substantial questions in our view. Alascom proposes continuing that arrangement, while AT&T and GCI assert that the joint service arrangement fosters inefficiency and should be eliminated. The cost-plus nature of the agreement provides undesirable incentives for Alascom because it receives reimbursement from AT&T for all of its costs assigned to the interstate jurisdiction as well as a return on the portion of its investment that is assigned to the interstate jurisdiction. When all of a company's expenses are reimbursed and a profit is virtually guaranteed, there may be little reason to control costs. Such a compensation mechanism may also create incentives for the carrier to inflate its rate base in order to increase earnings. Additionally, the joint service arrangement, with its settlement procedures, complicates the determination of the rates that other IXCs should be charged for their use of the Alascom network, thus creating the possibility of discrimination. Moreover, to our knowledge, this is AT&T's only joint service arrangement in its interstate operations. These deficiencies in the joint service arrangement suggest that alternative arrangements should be given serious consideration in an effort to achieve an improved market structure that will inure to the benefit of all toll ratepayers. Parties believing that the joint service arrangement remains the preferred market structure, of course, are free to present their arguments to rebut these points. Any party seeking to justify the joint service arrangement must explain why the deficiencies discussed herein are not present or can be ameliorated by other means.

59. The AT&T and GCI proposals support dissolution of the joint service arrangement and an open market structure for all toll carriers, including AT&T, that provide Alaska interstate service. Both parties claim that their proposals will create a more competitive market structure than the status quo. However, neither AT&T nor GCI adequately addresses the problems associated with implementing their proposed market structures or the effect that their plans would have on the achievement of our objectives.

60. We also have questions concerning the measures proposed by AT&T and GCI to address the high cost of serving rural locations in Alaska. GCI would have us recommend a broad waiver of the CCL rate element for all IXCs serving rural locations in Alaska. AT&T proposes establishment of an Alaska Rural Fund to spread these costs among all IXCs. Each plan contains a mechanism

that would give nondominant competitive entrants in the Alaska market benefits in the form of reduced costs or direct payments from a high cost pool. These measures are inconsistent with our proposed objective of open entry in the Alaska market based on the economic fundamentals of the marketplace without any Alaska-specific subsidy to competitive entrants.[87] Moreover, the AT&T and GCI plans attempt to establish a mechanism to subsidize particular routes. Such an approach appears unnecessary if, as we propose, only the carrier of last resort could benefit from any cost adjustments that might be provided. Furthermore, the development of any route specific subsidy would involve the Commission in extremely detailed, complex and time consuming cost allocation issues. Thus, we tentatively conclude that neither AT&T nor GCI's proposal should be adopted, although we do not foreclose the establishment of a cost adjustment mechanism for Alaska. The question of the need for such a mechanism for Alaska is discussed *infra*. [88]

61. We also have concerns regarding AT&T's proposed separations changes that would shift approximately $27 million to the intrastate jurisdiction. As previously discussed, one of this Joint Board's objectives is to ensure revenue requirement neutrality, and AT&T's proposal is in direct conflict with this. Therefore, if we adopt this objective, AT&T's proposal would have to be rejected.[89]

62. GCI's proposal to extend the benefits of the Carrier Lease Agreement to Alascom may not be desirable. In particular, GCI suggests that if Alascom enters the interstate message market on its own, AT&T should be required to provide Alascom with circuits for the termination of its Alaska originated traffic on terms similar to the terms of the AT&T agreement with GCI. It does not appear that this proposal would reduce the total cost of providing Alaska interstate message service or result in entry decisions based on the underlying economic fundamentals. We believe that extending the terms of that agreement to Alascom is inconsistent with the public interest and the objectives tentatively established in this proceeding. Thus, we cannot recommend adoption of this GCI proposal.

D. *Joint Board Alternative Market Structure Proposals*

63. We have developed two alternative plans for the structure of the Alaska interstate market for the purpose of inviting comments from interested parties. Both plans would terminate the present joint service arrangement and restructure the Alaska interstate message telecommunication market. However, the extent of the change is different under the two plans. We believe that seeking comments on these two alternatives will be helpful to us in preparing recommendations on the extent and nature of the market structure changes needed to achieve our objectives in this proceeding. Plans A and B are described briefly below, along with a number of specific questions that we ask commenting parties to address.

1. *Plan A*

64. Plan A would eliminate the AT&T and Alascom joint services and assign responsibility for the provision of interstate message toll services throughout Alaska to both AT&T and Alascom. Alascom would be responsible for services provided in Alaska, while AT&T would be responsible for services provided in the contiguous states. AT&T and Alascom would be required to provide MTS services to and from Alaska by interconnecting their facilities. The point of interconnection would occur in the contiguous states. AT&T would be precluded from constructing or leasing Alaskan facilities which are or could be provided by the Alascom network.

65. Alascom would be required to supply interstate toll facilities to any carrier requesting service, and would develop a tariff describing the terms, conditions, and rates for these services. Alascom's tariff would resemble intercarrier tariffs employed by AT&T, with the offerings available on a non-discriminatory basis to all IXCs. In addition, the OCCs would be given the choice of taking service from Alascom at a point or points in Alaska or using Alascom's facilities for service between the contiguous states and Alaska as well. Alascom's tariff rates on competitive routes would generally be expected to reflect costs, and thus cost allocation procedures would have to be developed to accomplish this. The Alascom tariff would not include any access charges of the local exchange carriers. Alascom would be required to file tariff proposals and supportive cost materials with the Commission which would be reviewed pursuant to its tariff procedures.

66. Plan A would assign AT&T the responsibility for ensuring interstate service at integrated rate levels in Alaska. The cost of Alaska service would be recovered by AT&T through nationwide averaged rates. All competitive carriers entering the Alaska market would compete against integrated toll rates since competition under this plan will function as it does in the contiguous states. Presubscription balloting would re-occur in Alaska to determine the customers' choice of IXC under the new market structure.[90]

67. This plan would require that Alascom submit detailed planning documents (including cost-benefit analyses) regarding any extensive system upgrade or redesign and obtain Commission approval prior to commencement of construction as a means of reducing costs. The current restrictions against construction of duplicative toll facilities in bush areas would be maintained to prevent uneconomic investment. Furthermore, to ensure reasonable intrastate toll rates, no changes in jurisdictional separations shifting costs to the intrastate jurisdiction would be adopted.

2. *Plan B*

68. Plan B would eliminate the joint service agreement between AT&T and Alascom and permit entry into the Alaska interstate market by competitive carriers pursuant to the requirements for nondominant carriers in the contiguous states. These carriers would provide service in competition with AT&T's nationwide average rate structure. Under this approach, Alascom's current interstate operations would be divided into two segments--the "distribution segment" and the "interstate link segment." The distribution segment would resemble the provision of transport access service in the contiguous states, in certain respects, and would include Alascom's current interstate investment in, and expenses associated with, the distribution facilities from its switches in Anchorage, Fairbanks, and Juneau to the facilities of the Alaska exchange carriers, as well as any portion of Alascom's switches used to provide equal access in Alaska. The interstate link segment would include all of Alascom's jurisdictionally in-

terstate investment and expenses that are not encompassed in the distribution segment. This would include Alascom's satellite and microwave facilities used to carry traffic from its switches in Alaska to the contiguous states, as well as any portion of Alascom's switches used by IXCs as a POP in Alaska. Cost allocation rules would have to be developed to allocate Alascom's investment and expenses between these two segments.

69. Alascom would file interstate tariffs to recover the costs associated with the distribution segment. These tariffs would offer both switched and private line elements to provide distribution of IXC traffic from each of Alascom's three switches to the Alaska exchange carriers' end offices. The Alascom distribution tariff charges would not include the cost of access services provided over the Alaska exchange carriers' facilities. Alascom, as the dominant carrier, would be responsible for carrying traffic from all exchanges in Alaska to one or more central points of interconnection with IXCs. However, IXCs would also be allowed to establish direct connections with Alaska exchange carriers. Alascom would provide equal access for exchanges that would not otherwise have this feature.

70. Plan B would require AT&T to continue to use Alascom facilities associated with the interstate link segment for a finite transition period in recognition of Alascom's past reliance on Commission policy requiring joint planning and service provision. Thus, AT&T would be required to take a specified number of circuits (roughly equivalent to the number it currently uses) for the remaining life of the relevant Alascom facilities.[91] AT&T could obtain circuits in excess of that number from any carrier it desired, or build its own facilities. After termination of the transitional requirements, AT&T would be free to provide interstate service between Alaska and the contiguous states via any facilities it chose to use. AT&T would become the provider of interstate message service between Alaska and the contiguous states at integrated rates. AT&T would inherit the interstate service obligations of AT&T and Alascom and would thus continue to serve all Alaska exchanges. Alascom could provide facilities for the interstate link segment, on a non-discriminatory basis, to AT&T and any other IXCs pursuant to a tariff filed with the Commission or pursuant to intercarrier contracts. Alascom would be permitted to enter the interstate message market itself. Finally, under Plan B, Alascom and AT&T would be required to file engineering and cost allocation proposals reflecting their plans for implementing the new market structure. These filings would be subject to public comment before implementation of the revised market structure.

E. *Questions on Market Structure Plans*

71. We urge interested persons to comment on a number of additional questions concerning our alternative market structure proposals. In addressing these questions, commenting parties should include sufficient documentation to allow a full evaluation of their positions. Any party presenting its own market structure proposal should discuss each of the issues raised below as it relates to that party's plan.

72. Initially, we ask commenting parties to discuss how each plan addresses the objectives we identified in Section II of this *Order*. Parties should identify the benefits and detriments of both Plan A or B relative to the joint service arrangement. Parties shall support their conclusions with a complete analysis, including, whenever possible, relevant quantitative support,[92] of the effects of adopting Plan A or B. In evaluating any proposal, we will apply the objectives we identified in Section II and evaluate each plan based on the extent to which it achieves improvements in the overall provision of telecommunications service in Alaska. In addition, we ask those parties to address the implications of Alascom's statewide service obligations for our choice of market structure. To this end, parties are also requested to identify those responsibilities and characteristics (system redundancy, fail-safe provisions, service quality, services provided, etc.) which should be required of the carrier of last resort in Alaska. The comments should discuss the market implications for a carrier required to fulfill such carrier of last resort responsibilities. Parties should discuss the costs and benefits associated with various trade offs between these factors as they affect our development of a recommended market structure. Parties should address how these performance characteristics should be weighed against expected system costs and system efficiency concerns. Parties should also discuss the impact that improvements in transmission technologies will have on future facility planning and operating decisions.

73. Parties are invited to suggest modifications to either Plan A or B that will foster achievement of our objectives in this proceeding, or facilitate the implementation of either plan. In addition, we request interested parties to identify any provisions, not contained in the description of the plans or Commission rules applicable to dominant and nondominant carriers, that are necessary to ensure that either plan will further promote our proposed objectives. Finally, interested parties are asked to comment on any legal issues raised by either plan.

74. Alascom stated that cost savings could be achieved under the joint service arrangement. The Joint Board seeks comments on improvements[93] which can be made to the joint service arrangement and current market structure in the event that no better alternative can be developed at this time.

75. We also ask interested persons to comment on any separations changes necessary to ensure jurisdictional revenue requirement neutrality in conjunction with Plan B. Plan A is premised on the assumption that it can achieve revenue requirement neutrality without separations changes. We ask parties to comment on these aspects of the plans. Parties should also discuss the timing of such changes under the transition mechanism for implementation of Plan B. We also ask parties to discuss any differences in the cost allocation issues raised by Plans A and B, and to address the inter-relationship between the separations procedures required to achieve revenue requirement neutrality and the cost allocation rules necessary to implement either plan. Commenting parties should also discuss whether Alascom's state-wide service obligations raise unique cost allocation issues, and suggest means of resolving any such problems that they identify. We invite interested parties to provide this Joint Board with draft separations rule changes as well as draft cost allocation rules they believe may be necessary for implementation of either plan. In the following paragraphs, we identify several additional areas on which persons should focus special attention.

76. We also ask interested parties to comment on how achievement of revenue requirement neutrality should be measured. Specifically, they should discuss what informa-

tion should constitute the baseline for determining whether cost allocation shifts had taken place. For example, would adjusted data from the same month in consecutive years be sufficient to gauge revenue requirement neutrality, or will it be necessary to replicate that month's data under both sets of separations procedures? Interested persons should also address the procedures to be used in ensuring that cost shifts do not develop. We also invite parties to provide the Joint Board with proposals regarding the actions which should be taken in the event that unanticipated jurisdictional cost allocation shifts are observed after implementation of the new market structure.

77. Interested persons are requested to analyze Plan A and Plan B and estimate the amount of any revenue requirement shifts between the interstate and intrastate jurisdictions that would result if either Plan were to be adopted without additional measures to prevent material jurisdictional revenue requirement shifts. Parties are to address any concerns they may have regarding potential risks to revenue neutrality under Plans A and B given future changes in either the market structure or regulatory policy. In making these estimates for Plan B parties should assume that AT&T would use three entry locations. Parties are requested to comment on alternative network configurations that they believe will eventually be employed in Alaska. If the parties identify structures employing more or less than three entry locations, they shall estimate the revenue requirement impact of any such alternative market structure. AT&T and Alascom are requested to discuss the feasibility of using fewer than three entry locations and identify the effect such a structure would have on network design and cost. Alascom, AT&T, and GCI should each describe, with as much detail and supporting information as possible, the estimated revenue impact and overall change in costs for their operations under each plan. The comments should identify both the short-run and the long-run effects, and contain sufficient supporting data to permit evaluation of the accuracy of these estimates.

78. Plans A and B each propose that Alascom offer some or all of its services to the IXCs pursuant to tariff. We ask interested parties to comment on the appropriate structure for the tariffs that Alascom would file to implement either Plan A or Plan B. Alascom is specifically requested to file sample tariff pages reflecting the terms and rate structure it would employ under each plan. It shall also discuss the rationale for the rate structure proposed and identify any cost allocation principles it believes must be adopted to implement a tariff under either plan.[94] We also ask interested parties to discuss the advantages and disadvantages of using carrier contracts as opposed to tariffs for the interstate link segment of Plan B. Finally, we ask interested parties to address whether there are any special concerns applicable to the transition period if a carrier contract were to be employed.

79. We request that interested persons identify and address any issues related to the demarcation point between the interstate link segment and the distribution segment of Alascom's operations under Plan B. Among other things, commenting parties should discuss the public policy implications of implementing equal access at the Alascom switches when it would not otherwise be available, as well as the ability of the Alascom entry switches to provide equal access and their ability to perform this function while simultaneously serving as an IXC POP. They should also identify the principles that would be used to develop separations and cost allocation procedures applicable to Alascom's switches. These comments should discuss a scenario in which AT&T establishes a POP located at one or more of Alascom's switches, as well as a scenario in which no IXC establishes a POP using Alascom's switches. Alascom shall estimate the cost of equipping its three entry switches with the ability to provide equal access for exchanges that would not otherwise have this feature and compare this to the cost of equal access implementation by the exchange carriers involved. Finally, commenting parties should also address the issue of whether a new round of presubscription balloting should take place if either Plan A or Plan B is implemented.

80. Another question raised by proposals to restructure the Alaska market involves the scope of competitive interstate entry in Alaska. In the *Bush Earth Station Ownership* proceeding, the Commission found that the traffic on bush routes would only support one earth station in each bush exchange, and barred competitive service to bush locations over separate facilities. Plan A continues this policy while Plan B does not explicitly address this policy. We ask commenting parties to discuss this subject with respect to both plans in light of our objectives in this proceeding.

81. In discussing our competitive entry objective, we stated that entry into the Alaska interstate telecommunication market should be based on economic principles, and that competitive entrants should not receive support or other assistance for their services. AT&T and GCI each support permitting the Carrier Lease Agreement to remain in effect until it expires in 1992 by its own terms. Although Alascom has abandoned its opposition to the continuation of the Carrier Lease Agreement,[95] we believe that comment on possible public interest consideration presented by the Carrier Lease Agreement would be helpful. Accordingly, interested persons are requested to comment, in light of our previously discussed objectives, on the implications for both Plan A and Plan B of allowing the Carrier Lease Agreement to continue in effect until its scheduled termination. They are also requested to comment on whether any public interest considerations exist that should lead this Joint Board to recommend the termination of the Carrier Lease Agreement in advance of its scheduled termination.

F. *Cost Adjustment Mechanism*

82. In paragraph 60, *supra*, we tentatively concluded that the mechanisms proposed by AT&T and GCI to address the high cost of serving rural Alaska should not be adopted. However, the fact that these parties proposed specific mechanisms suggests that they perceive a potential for equitable or competitive problems to develop under some competitive market structures due to the need to provide for the recovery of the substantial portion of Alascom's costs that are assigned to the interstate jurisdiction by the separations procedures. We reach no decision in this *Supplemental Notice* on the need for a cost adjustment mechanism for Alaska, and therefore neither Plan A nor Plan B contains any special mechanism for addressing this situation, if it in fact poses a problem.

83. Interested persons are invited to comment on whether a specific mechanism is necessary under either Plan A or Plan B to address any aspects of the high cost of serving Alaska. Persons advocating such a mechanism should carefully identify the benefits that would result

from adoption of such an approach. Interested parties should discuss the short-run and long-run impact of adopting a cost adjustment mechanism for Alaska. Commenting parties should also address the effect, if any, that a cost adjustment mechanism would have on the cost allocation issues raised by the market structure plans, and how a cost adjustment mechanism would work in conjunction with the Alascom cost allocation procedures previously discussed. We also ask for comments on the means of funding a cost adjustment mechanism. Specifically, parties should address whether the mechanisms used for the recovery of the existing high cost assistance should be used, or whether a different mechanism should be employed. If a party believes a better method exists, it should describe that method. In addition, interested persons should address whether any cost adjustment mechanism should be permanent or transitional. Advocates of a transitional mechanism should describe the means that should be used to accomplish this transition and the consequences of phasing out any cost adjustment mechanism.

G. *Data Requests*

84. In this section, we specify additional data which we believe is necessary to an analysis of the record and application of the objectives outlined above. In responding to the data requests, commenting parties should include sufficient documentation to allow a full evaluation of their positions.

85. Data was submitted to this Joint Board in July 1986. GCI and Alaska filed supplemental data.[96] To ensure that we are making our recommendations based on current information, several aspects of the data filed earlier in this proceeding needs to be updated and supplemented. Accordingly, the parties are requested to file the following information with this Joint Board.

86. We request that AT&T (with respect to its Alaska operations), Alascom and GCI update the descriptions of their operating arrangements submitted in earlier filings. We ask Alascom to provide this Joint Board with its plans for any major changes in its facilities within the next six years. This material should include a schedule indicating the timing of any major replacements or upgrades planned for the Aurora satellite, major toll centers, Alascom earth stations, and major terrestrial transmission facilities. Alascom shall discuss the major economic or other factors that are involved in its decisions to replace or upgrade its facilities. Alascom shall also provide this Joint Board with information on the remaining useful life of assets associated with the facilities included in the interstate link segment under Plan B. We also ask Alaska to update previously provided information that relates to the issues discussed herein.

87. Alascom and GCI shall each file an income statement and a year-end balance sheet for 1987.[97] Each carrier shall also provide financial reports for the fourth quarter of 1987 and the first three quarters of 1988. These reports shall include a level of detail comparable to similar reports contained in the earlier data submission.[98] AT&T, Alascom, and GCI shall outline how they anticipate they would modify their current operations, network design, quality and type of services provided, and market structure given the adoption of Plan A or Plan B. All parties are also invited to comment on the anticipated network and operational structure of the interexchange carriers after the adoption of Plan A or Plan B. AT&T shall estimate its 1988 and 1989 revenues from interstate Alaska message services and the cost of that service, dividing the costs into the following categories -- Alaska exchange access, Alascom expenses, AT&T contiguous states transmission, and contiguous states exchange access. AT&T and Alascom shall provide this Joint Board with cost analyses for 1988 and 1989 developed under the joint service arrangement, Plan A, and Plan B.

88. Alascom and GCI shall each provide northbound and southbound minutes-of-use data for each month since October 1987. The southbound data shall be categorized to reflect minutes originating in Anchorage, Fairbanks, Juneau, and all other locations. GCI is to identify separately its southbound traffic terminated over exchange access in the Seattle area, Megacom, WATS, and other services or facilities. Alascom, GCI and AT&T each shall estimate the growth they anticipate in interstate and intrastate minutes-of-use for 1988 compared to 1987's fourth quarter traffic data.

89. Ensuring that any market structure revisions are accomplished in a manner that is neutral with respect to intrastate revenue requirements necessitates the collection of data to measure the effect of revised separations procedures on revenue requirement allocations. In the following paragraph, we request specific data to be used as a baseline for our analysis. However, we recognize that it may be necessary, assuming a revised market structure is selected, to ask Alascom to make additional data runs to test separations alternatives specifically designed to reflect the chosen market structure. Accordingly, we are limiting the scope of our data request in this area at present.

90. Alascom is to file separations data for March 1987 and March 1988 on computer readable spreadsheets to be obtained from the Commission.[99] Two sets of separations data are required for March 1987, the first reflecting the actual separations study performed, and the second assuming that the 1985 frozen allocator for Category 8.23 had been in effect in March 1987. In addition, Alascom shall file annual 1987 data in the same format.[100]

IV. OTHER ISSUES

A. *Separations Procedures for Bush Earth Stations*

91. The issue of the proper separations treatment for the bush exchange carriers' investment in earth stations and the expenses associated with that ownership interest is also before this Joint Board.[101] AT&T, the only party commenting on this issue to date in this proceeding, notes that United Utilities, Inc. (United), uses Alascom's CMM factor in separating its share of the investment and expenses of the bush earth stations United owns jointly with Alascom. AT&T opposes this approach and argues that any necessary support should be encompassed in the Alaska Rural Fund it proposes.[102]

92. The Commission permitted the bush exchange carriers to use Alascom's CMM factor on an interim basis to maintain the status quo. If bush exchange carriers had been required to develop their own allocation factor rather than using Alascom's CMM factor, a significant shift of revenue requirements to the intrastate jurisdiction would have resulted. Since a substantial portion of this bush earth station investment and expense relates to message services, we tentatively conclude that the separations of

this investment and expense is within the scope of our revenue requirement neutrality objective. Interested persons are asked to comment on this tentative conclusion, and, in doing so, to discuss with specificity the separations changes, if any, necessary to implement this tentative conclusion. We also ask Alascom and the Alaska exchange carriers with bush earth station investment to provide data showing the amount of their 1987 investment in, and expenses for, jointly owned bush earth stations, and to project this data for 1988 and 1989.

B. *Alaska - Hawaii Rate Integration*

93. Alaska contends that the Commission has already determined that rate integration applies to the Alaska-Hawaii route.[103] Alaska also argues that rate integration will promote affordable, universal service, and contends that there is no basis for treating service between Alaska and Hawaii differently than service between Alaska and the contiguous states. Hawaii recognizes that the implementation of rate integration for services between Alaska and the other states of the Union may present certain unique problems. However, it states that the same rate integration principles that apply to the Alaska-contiguous states route should apply to the Alaska-Hawaii route. Hawaii asserts that anything less would constitute discrimination against the residents of Hawaii.

94. Alascom contends that this Joint Board should recommend that the joint service arrangement between Alascom and AT&T support MTS and WATS service between Alaska and Hawaii on the same basis as service between Alaska and all other United States points. Alascom argues that failure to do this constitutes discrimination in violation of Section 202 of the Act. GCI opposes Alascom's request that the Commission mandate the joint provision of service on the Alaska-Hawaii route by AT&T and Alascom. It argues that such a restrictive policy would give Alascom an artificial competitive advantage by forcing AT&T to use Alascom's facilities rather than those of another IXC to terminate its Alaska-bound traffic. This would, according to GCI, deprive customers of the benefits of competition on the Alaska-Hawaii route. AT&T argues that it should not be required to provide joint MTS and WATS service with Alascom on the Alaska-Hawaii route or be forced to offer such service at non-compensatory, integrated rates. AT&T contends that such a requirement would be contrary to the public interest because it is anti-competitive, creates incentives for inefficiency, and would require AT&T to subsidize Alascom.

95. As discussed previously, we have tentatively identified continuation of rate integration for service between Alaska and the contiguous states as an important goal in this proceeding. We believe that the public policy implications of rate integration on the Alaska-Hawaii route are no different from those underlying rate integration between Alaska and the other states. Accordingly, we tentatively conclude that rate integration should be implemented on the Alaska-Hawaii route. That is, rates on this route should be integrated into the domestic pattern as are rates for all other domestic message service. We also tentatively conclude that service on the Alaska-Hawaii route should be provided pursuant to the Alaska-contiguous states market policy guideline adopted by the Commission in this proceeding. We invite interested parties to comment on these tentative conclusions.

V. ORDERING CLAUSES

96. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 1, 4 (i) and (j), 201-205, 221, and 410(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154 (i) and (j), 201-205, 221, and 410 (c), that interested persons are to file the data requested herein with the Secretary, Federal Communications Commission, on or before **February 27, 1989.** Comments are to be filed on or before **April 13, 1989** and reply comments are to be filed on or before **May 15, 1989.** Each participating party is to file an original and six (6) copies of their filings with the Secretary, Federal Communications Commission, and mail one (1) copy to each person listed in Appendix B.[104] A copy of each filing is also to be provided to the Commission's contractor for public records duplication, International Transcription Services, Inc., Suite 140, 2100 M St., N.W., Washington, D.C. 20037. Copies of all-filings will be available for public inspection in the Commission's public reference room, 1919 M St., N.W. Washington, D.C.

97. IT IS FURTHER ORDERED, that the motion filed by Alascom, Inc., to compel AT&T to file data IS DISMISSED.

98. IT IS FURTHER ORDERED, that the November 30, 1987, motion filed by Alascom, Inc., requesting acceptance of its supplemental data filing IS GRANTED.

99. IT IS FURTHER ORDERED, that the motion for leave to file pleading out of time, filed by General Communication, Incorporated on March 2, 1987, IS GRANTED.

100. IT IS FURTHER ORDERED, that the motion for leave to file, late filed Comments, filed by the State of Alaska on March 5, 1987, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

This appendix lists supplemental filings made before this Joint Board that are not individually in the text of the order. This listing does not include *ex parte* filings.

List of Supplemental Filings in CC Docket No. 83-1376 since release of NPRM:

Feb. 17, 1987	Alascom letter to Alaska congressional delegation responding to letter from Chairman Fowler to delegation
Sept. 10, 1987	Letter submitting GCI's SEC Form 10-Q
Jan. 27, 1988	Alascom prefiled direct testimony in Alaska PUC rate case
Jan. 28, 1988	Supplemental comments of Alascom
Feb. 9, 1988	AT&T opposition to Jan. 28, 1988 supplemental comments of Alascom

Feb. 22, 1988	AT&T comments on Alascom Jan. 22, 1988 filing
Mar. 7, 1988	Alascom response to AT&T comments of Feb. 22, 1988
Mar. 31, 1988	State of Alaska comments on AT&T's Feb. 22, 1988 comments

APPENDIX B

Amended Service List for CC Docket No. 83-1376.

Commissioner E. Bruce Hagen
North Dakota Public Service Commission
State Capitol Building
Bismark, ND. 58505

Chairman Susan M. Knowles
Alaska Public Utilities Commission
420 L. Street
Suite 100
Anchorage, AK. 95501

Chairman William E. Long
Michigan Public Service Commission
Mercantile Building
6545 Mercantile Way
P.O. Box 30221
Lansing, MI. 48910

Commissioner Nels J. Smith
Public Service Commission
The State of Wyoming
Herschler Building
122 W. 25th Street
Cheyenne, WY. 82002

Ronald G. Choura
Michigan Public Service Commission
6545 Mercantile Way
Lansing, MI. 48910

Rowland Curry
Texas Public Utilities Commission
7800 Shoal Creek Blvd.
Suite 400 N
Austin, TX. 78757

Charles D. Gray
National Association of Regulatory Utility Commissioners
Room 1102
ICC Building
Constitution Avenue and 12th Street, NW
P.O., Box 684
Washington, D.C. 20044

Carl Hunt
Chief Economist
Colorado Public Utilities Commission
1580 Logan Street
Office Level One
Denver, CO. 80203

Michael Korber
Wyoming Public Service Commission
122 W. 25th Street
Cheyenne, Wy. 82002

Jim Lanni
Rhode Island Public Utilities Commission
100 Orange Street
Providence, RI. 02903

Lorraine Plaga
Alaska Public Utilities Commission
420 L. Street
Suite 100
Anchorage, AK. 99501

Allen Roll
North Dakota Public Service Commission
State Capitol Building
Bismark, ND. 58505

Chris Herberger, Staff
House Special Committee on Telecommunications
Alaska State Legislature
House of Representatives
Box V
State Capitol
Juneau, AK. 99811

APPENDIX C

Parties may obtain copies of the model B spreadsheets from the Federal Communications Commission staff either in hard copy or on diskette. The diskette form of the model runs on Lotus 1-2-3, Version 2.01, software.

For further information call (202) 632-9342. For copies of the model contact Rose Crellin, Policy and Program Planning Division, Common Carrier Bureau, Federal Communications Commission, Washington, D.C. 20554. Copies may be hand delivered or picked up at 1919 M Street, N.W., Rm 544 Washington, D.C. 20554

FOOTNOTES

[1] Integration of Rates and Services, 50 Fed. Reg. 41714 (Oct. 15, 1985).

[2] Section 410(c) provides that, prior to Commission action, questions concerning the separation of common carrier property and expenses must be referred to a Federal-State Joint Board for preparation of recommendations. The Commission may also refer other common carrier communications issues of mutual state and federal concern to a Joint Board. Thus, development of Joint Board recommendations concerning separations changes

that may be necessary to implement a revised Alaska interstate market structure was required, while referral of the market structure issues was discretionary. 47 U.S.C. §410(c).

[3] Pursuant to the Commission's rate integration policy, services between the contiguous states and Alaska, Hawaii, Puerto Rico, and the Virgin Islands (the noncontiguous points) are provided at rates that are equivalent to those prevailing for comparable distances in the contiguous states. Establishment of Domestic Communications Satellite Facilities, 35 FCC 2d 844, *aff'd on recon.*, 38 FCC 2d 665 (1972), *aff'd sub nom.* Network Project v. FCC, 511 F.2d 786 (D.C. Cir. 1975). For an explanation of the development of the Commission's rate integration policy, *see* Referral of Questions from General Communication Incorporated v. Alascom, Inc., 2 FCC Rcd 6479 (1987).

[4] Policies Governing the Ownership and Operation of Domestic Satellite Earth Stations in the Bush Communities of Alaska, FCC 86-68 (released Feb. 25, 1986) (*Bush Earth Station Ownership proceeding*).

[5] Integration of Rates and Services, 2 FCC Rcd 607 (1987) (*Supplemental Notice*).

[6] Integration of Rates and Services, 51 Fed. Reg. 17756 (May 15, 1986).

[7] *Id.* at para. 5.

[8] Alaska filed supplemental data on August 14, 1986 and GCI filed supplemental data on July 7, 1987.

[9] Parties filing market structure proposals or comments included Alaska, AT&T, Alascom, GCI, ATA, the Municipality of Anchorage, d/b/a, Anchorage Telephone Utility (ATU), and the National Telecommunications and Information Administration (NTIA).

[10] Opposition comments were filed by Alaska, Alascom, GCI, AT&T and ATA. The GCI and Alaska opposition comments were filed on March 2 and March 5, respectively, and were accompanied by motions for leave to file comments late. We grant these motions. Reply comments were filed by Alaska, Alascom, GCI, AT&T, ATA, and ATU.

[11] On November 30, 1987, Alascom also filed evidentiary materials concerning Alaska intrastate toll rates, along with a motion requesting leave to file this material. AT&T opposed this request. In light of the fact that we are seeking further comment ourselves, and in order to develop a full record, we grant Alascom's motion. Interested persons may file comments on Alascom's submission in connection with their comments in response to this Order.

[12] The interim agreement provides that AT&T and Alascom will jointly provide interstate MTS and WATS service between Alaska and Hawaii at rates that reflect the cost of providing the service. These rates are higher than integrated rates would have been. On December 30, 1987, the Common Carrier Bureau directed AT&T and Alascom to continue providing joint service on the Alaska-Hawaii route pending Commission action on AT&T's Section 214 Application for authority to provide part of this service over facilities obtained from GCI, rather than in conjunction with Alascom. Integration of Rates and Services, 3 FCC Rcd 356 (1987).

[13] Comments were filed by the State of Hawaii (Hawaii), Alaska, AT&T, GCI, and Alascom.

[14] Opposition comments were filed by Alaska, AT&T, Alascom, and Hawaii. Reply comments were filed by Hawaii, AT&T, and Alascom.

[15] *See supra* note 4.

[16] *Bush Earth Station Ownership* proceeding at 10 n. 23.

[17] Response of the State of Alaska to Order Requesting Data and Inviting Comments at Section A.

[18] According to data submitted by Alaska, per capita income for state residents in 1985 was 32% higher than the national average. Alaska stated that the cost of living for Anchorage was approximately 39% higher than the national average for the last quarter of 1985, and that costs in locations outside Anchorage were 8% higher than in Anchorage. Response of the State of Alaska to Order Requesting Data and Inviting Comments at Section G.

[19] *See* Telephone Subscribership in the U.S., Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Sept. 8, 1987. Alaska's subscribership rate is below the national average of 92.9%, although four states had lower penetration rates.

[20] Pacific Telecom, Inc., Alascom's parent, owns several exchange carriers in Alaska.

[21] The annual intrastate revenue requirement for the Alaska exchange carriers is approximately $120 million. Of this amount, approximately $76 million is recovered from local service revenues and approximately $44 million from Alascom settlements for intrastate toll services. *See* Data of the Alaska Telephone Association, Volumes I-VII, filed July 15, 1986. *See also* Response of Alascom, Inc. to Federal/State Joint Board's Request for Data Relating to the Alaska Market, filed July 15, 1986, (Alascom Data Response) Volume III, Exhibit No. 20.

[22] Competitive Common Carrier Services and Facilities, 98 FCC 2d 1191, 1201 n. 33 (1984).

[23] On November 5, 1987, AT&T filed a petition with the Commission requesting a ruling that the present settlement arrangements between AT&T and Alascom constitute an unlawful division of charges under Section 201 of the Communications Act, 47 U.S.C. § 201. Alascom opposed the AT&T petition, and Alaska and Hawaii filed comments concerning that petition. AT&T filed reply comments. Alascom also filed a Memorandum of Law concerning AT&T- Alascom Joint Service Arrangement and a White Paper on the AT&T-Alascom Joint Service Agreement with this Joint Board on July 24, 1988.

[24] AT&T estimates that the cost of providing Alaska interstate MTS and WATS service will exceed the $132.1 million in revenues from those services by approximately $97 million in 1987. AT&T states that the cost of providing Alaska interstate message service is $229.3 million, comprised of: (1) Alaska exchange access--$51.4 million; (2) Alascom settlements--$115 million; (3) AT&T contiguous states' distribution--$30.2 million; and (4) contiguous states' access--$32.7 million. AT&T Comments at Attachment A.

Alascom criticizes AT&T's use of a fully distributed costing methodology in developing this estimate, and argues that the incremental cost of providing Alaska services is substantially less than the amount claimed by AT&T. In particular, Alascom asserts that AT&T has overstated the cost of exchange access and billing by about $40 million because only the incremental costs caused by Alaska traffic should be considered. It notes that traffic increases do not change the interstate access costs associated with non-traffic-sensitive plant or cause proportional increases in the access costs for traffic-sensitive plant. Since AT&T pays the overwhelming majority of access costs already, additional traffic produces only a minor incremental increase in AT&T's access costs. Additionally, Alascom argues that AT&T's own network costs for the distribution of Alaska traffic are not as great as AT&T states because much of this calling takes place in AT&T's off-peak periods, with incremental costs approaching zero for AT&T's own facilities. Alascom Comments at 31-32.

Alaska contends that AT&T's revenue shortfall in the Alaska market is a natural consequence of rate integration and is balanced by AT&T's provision of service at averaged rates in its low cost markets.

[25] MTS and WATS Market Structure and Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board, CC Docket Nos. 78-72, 80-286 and 86-297, 2 FCC Rcd 2639 (1987).

[26] Alascom Data Response, Volume I, page 31-36.

[27] *See* Integration of Rates and Services, 2 FCC Rcd. 2447 (1987), *aff'd sub nom.* General Communication Incorporated v. FCC, No. 87-1112 (D.C. Cir. Dec. 10, 1987).

[28] *See* GCI Update of Response to FCC Order Requesting Data and Inviting Comments filed July 7, 1987 (GCI Data Update) at II 5.1-5.

[29] *Id.* at II 5.1.

[30] *See* GCI Response to FCC Order Requesting Data and Inviting Comments filed July 15, 1986; GCI Data Update.

[31] The agreement is part of a settlement of GCI's claims against AT&T in an antitrust suit filed by GCI against Alascom and AT&T. General Communication Incorporated v. Alascom, Inc., C84-523 (W.D. Wash., filed Apr. 24, 1984). GCI and AT&T filed a joint motion with the Commission on March 20, 1985, requesting that the Commission approve the agreement and substitute its terms for the interim relief that the Commission had previously granted GCI pending resolution of this proceeding, Integration of Rates and Services, FCC 84-512 (released Dec. 11, 1984) (*GCI Order*), *appeal dismissed sub nom.* American Telephone & Telegraph Co. v. FCC, 84-1605 (D.C. Cir. May 14, 1985). The Commission granted this request and accepted the Carrier Lease Agreement portion of the AT&T/GCI settlement agreement. Integration of Rates and Services, FCC 85-235 (released May 1, 1985). The Commission decision was subsequently vacated and remanded. Alascom, Inc. v. FCC, No. 85-1279 (D.C. Cir. Jan. 27, 1987). In response to the Court's decision, the Commission vacated that order, as well as the *GCI Order*. Integration of Rates and Services, 2 FCC Rcd 2896 (1987). Alascom subsequently filed a motion with the Court requesting that it direct the Commission to void the Carrier Lease Agreement. The Court rejected Alascom's motion, finding that the Court had not ruled on the lawfulness of the agreement. Alascom, Inc. v. FCC, No. 85-1279 (D.C. Cir. June 9, 1987). GCI's antitrust suit against Alascom and Alascom's counterclaim against GCI and AT&T were resolved in a settlement agreement in GCI v. Alascom, Inc., C84-523 (W.D. Wash., May 16, 1988). On May 24, 1988, Alascom, in furtherance of this settlement agreement, filed a letter withdrawing, its opposition to the terms and conditions of the Carrier Lease Agreement, and indicating that it is not opposed to continuation and termination of the agreement according to the terms adopted on March 20, 1985.

[32] GCI is entitled to receive 696 circuits beginning April 1, 1988, 720 circuits beginning October 1, 1988, 576 circuits beginning on the 1989 anniversary date of the Carrier Lease Agreement, 384 circuits beginning on the 1990 anniversary date, and 192 circuits beginning on the 1991 anniversary date. The agreement expires on the 1992 anniversary date.

[33] However, the Commission noted that alternative means of implementing rate integration might exist.

[34] *See infra* paras. 38-40.

[35] *See infra* paras. 41-42.

[36] *See infra* paras. 47-49.

[37] *See infra* paras. 50-51.

[38] Under the existing arrangements, rate integration applies only to interstate MTS and WATS. AT&T and Alascom each provide interstate private line services at rates based on their own costs. The Alaska interstate private line market structure is, accordingly, not the primary focus of this proceeding. MTS and WATS Market Structure Inquiry (Phase II), 92 FCC 2d 787, 836-37 (1982).

[39] As discussed in a subsequent section of this Order, we are seeking comment on the need for a cost adjustment mechanism for Alaska. Whether or not such a mechanism is adopted, we believe that interstate MTS and WATS rates for service to and from Alaska, including bush locations, should be fully integrated into AT&T's domestic rate pattern. We are not persuaded that this would unduly burden AT&T. As Alascom and Alaska observe, the above-average cost (as estimated by AT&T) associated with serving Alaska today represents roughly the same portion of AT&T's interstate revenue that it did prior to the AT&T divestiture. AT&T has not provided sufficient evidence that it has been significantly harmed in any way by nationwide rate averaging. Nor has a case been made that AT&T's competitiveness in the market has been materially affected by its support to Alaska. Finally, as has been stated by Alaska and Alascom, AT&T is fully compensated for the losses it experiences in the Alaska market through the rate averaging process.

[40] MTS and WATS Market Structure, 81 FCC 2d 177, 192 (1980).

[41] MTS and WATS Market Structure Inquiry, 92 FCC 2d 787 (1982).

[42] Subsequent to the Commission's decision authorizing competitive entry, GCI, a new entrant in the interstate Alaska telecommunication market, filed a petition with the Commission seeking interim relief to address what it believed were anti-competitive biases in the existing market structure. On December 11, 1984, the Commission granted GCI's petition, providing it with interim relief pending resolution of the issues in this proceeding concerning the Alaska market structure. *See supra* note 31.

[43] The question of intrastate toll competition is not before us in this proceeding, and our endorsement of an open entry policy for the provision of interstate service does not imply that an open entry policy should or should not be adopted for the provision of intrastate services in Alaska. That is, of course, an issue for the Alaska PUC. However, we invite interested persons to comment on the effects, if any, that a decision by the Alaska PUC to open the intrastate market to competitive entry would have on the interstate market structures under consideration by this Joint Board.

[44] *See* our discussion of the need for a carrier of last resort *infra* paras. 29-30.

[45] Section 1 of the Communications Act states that the Commission was created:

> [f]or the purpose of regulating . . . communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide and worldwide wire and radio communication service with adequate facilities at reasonable charges . . . .

47 U.S.C. § 151.

[46] *See* Amendment of Part 67 of the Commission's Rules, Decision and Order, 96 FCC 2d 781 (1984), *modified*, MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, Decision and Order, CC Docket Nos. 78-72 and 80-286, 50 Fed. Reg. 939 (1985), *recon. denied*, FCC 86-56

(released Jan. 30 1986), *further modified*, 2 FCC Rcd 2953 (1987). This program permits an additional interstate assignment of local loop costs in excess of specified levels. It is designed to permit high cost telephone companies to keep local rates lower than they otherwise would be.

[47] *See* MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, Decision and Order, CC Docket Nos. 78-72 and 80-286, 50 Fed. Reg. 939 (1985), *recon. denied*, FCC 86-56 (released Jan. 30, 1986), *modified*, 51 Fed. Reg. 1371 (1986), *further modified*, 2 FCC Rcd 2953 (1987).

[48] *See, e.g.*, MTS and WATS Market Structure, 93 FCC 2d 241, 266-67 (1979).

[49] Alascom Comments at 8-9.

[50] Alaska Reply Comments at 5-6.

[51] AT&T provides interstate service throughout the contiguous states. Competitive IXC services are also available to most subscribers in the contiguous states. Intrastate interexchange service is provided by the Bell Operating Companies, AT&T and a number of competitive carriers pursuant to state authorizations.

[52] *See supra* para. 18.

[53] AT&T would accomplish this by creating two Alascom study areas for separations purposes. *See* AT&T Comments at 27-28.

[54] *See , e.g.*, Alascom Further Comments at 18-19.

[55] AT&T supports its contention that additional costs could be allocated to the intrastate jurisdiction by applying intrastate toll rates from other states to Alascom's intrastate traffic volumes. AT&T concludes that application of these charges would increase revenues. *See* AT&T Comments at 20 and Attachment C. We do not find this argument convincing. First, AT&T fails to account for differences in intrastate calling patterns. These patterns vary widely, and intrastate toll rates that may be reasonable in light of the traffic patterns within a particular state, may not produce reasonable results when applied to intrastate traffic in a state with different calling patterns. Second, variations in the division of intrastate costs between toll and local exchange services could significantly affect the validity of this analysis. While Alaska local exchange rates do not appear to be above average in urban areas, they are substantially higher in rural areas. We emphasize that this Joint Board must consider the overall level of the Alaska intrastate cost allocation, not specific intrastate tariff rates.

[56] *See* MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, Decision and Order, CC Docket Nos. 78-72 and 80-286, 50 Fed. Reg. 939 (1985), *recon. denied*, FCC 86-56 (released Jan. 30, 1986); MTS and WATS Market Structure and Amendment of Part 67 (New Part 36) of the Commission's Rules, 2 FCC Rcd 2639 (1987).

[57] *See* MTS and WATS Market Structure and Amendment of Part 67 (New Part 36) of the Commission's Rules, 2 FCC Rcd 2639 (1987).

[58] *See* MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, Memorandum, Opinion and Order on Reconsideration and Supplemental Notice of Proposed Rule Making, CC Docket Nos. 78-72 and 80-286, 2 FCC Rcd 5349 (1987); Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 2 FCC Rcd 6333 (1987).

[59] The Federal-State Joint Board in CC Docket No. 80-286 recently expressed similar concerns in recommending that the allocator for Category 4.23 circuit equipment be frozen at 1985 levels for all IXCs, in large measure, to avoid a substantial increase in Alascom's intrastate revenue requirement. *See* Amendment of Part 67 of the Commission's Rules, Recommended Decision and Order, 2 FCC Rcd 2551, 2564-65 (1987). This recommendation was subsequently adopted by the Commission. *See* MTS and WATS Market Structure and Amendment of Part 67 (New Part 36) of the Commission's Rules, 2 FCC Rcd 2639 (1987).

[60] Our current findings should not be construed as support or opposition to future decisions made by other Joint Boards regarding separations issues.

[61] 47 U.S.C. § 151.

[62] AT&T Reply Comments at 9.

[63] On November 3, 1987, AT&T filed a Section 214 Application with the Commission, seeking authority to serve Alaska using GCI facilities. *See* File No. W-P-C-6136. Alascom filed a petition to deny or in the alternative, to hold the AT&T application in abeyance until the issues in this docket are decided. The States of Alaska and Hawaii filed comments on AT&T's application. AT&T opposed the Alascom petition to deny. Alascom filed a reply to the AT&T opposition. On November 21, 1988, the Commission released an order granting AT&T's application, conditioned on the outcome of the market structure inquiry of this docket. American Telephone & Telegraph Company, DA-1774.

[64] *See* AT&T Comments at Attachment A. *See supra* note 24 for a brief discussion of the derivation of this estimate.

[65] AT&T states that the remaining $18 million in support for Alaska service can be reduced through competition and more efficient network design. AT&T Comments at 26-27.

[66] AT&T Reply Comments at 9.

[67] *See infra* para. 50.

[68] *See* Alascom Further Comments at 26-27, and Alascom Reply Comments at 10-11.

[69] Alascom Reply Comments at 12.

[70] Alascom Comments at 10, 29-30.

[71] The Alascom intrastate toll rate structure is currently under investigation by the Alaska Public Utilities Commission (Docket U-87-25). One of the primary issues regarding Alascom's proposed rate design is the allocation of revenue requirement per MTS mileage band.

[72] While Alascom initially opposed the continuation of the Carrier Lease Agreement in its comments, it has subsequently withdrawn its opposition. *See supra* note 31.

[73] *See* Alascom Comments at 37-38 and GCI Data Response.

[74] GCI states that interstate traffic bound for rural Alaska is transmitted by satellite from the contiguous states to an Alascom entry earth station, and then, in most cases, retransmitted by satellite to its final destination. GCI argues that it would be more rational to route these calls directly between the originating or terminating telephone company office and an AT&T switch in the contiguous states. *See* GCI Comments at 7, and GCI Reply Comments at 21.

[75] Alascom questions the function, feasibility, cost estimates and system reliability of the proposed GCI network and states that the risk to lifeline services in the event of GCI failure do not justify acceptance of the plan. Alascom Opposition Comments at 38-42 and Attachment F.

[76] GCI's proposed network would consist of four classes of new earth stations and a small number of microwave spurs located in Alaska. GCI's Seattle gateway earth station would be expanded and a network management center would be added. GCI's network would provide direct connection between each Alaska Class V end office and AT&T's 4 ESS in Seattle. GCI comments at 20-21 and Appendix 6.

[77] *Id.* at 21.

[78] The Carrier Lease Agreement is scheduled to expire by its own terms in 1992.

[79] GCI Reply Comments at 9.

[80] GCI Comments at 19.

[81] GCI Reply Comments at 3.

[82] Alaska's comments on this subject are discussed in more detail in the section concerning the objectives of this proceeding. *See supra* para. 21.

[83] *See* Alaska Comments at 29; Alascom Comments at 16-18.

[84] Alaska Reply Comments at 16. An AT&T POP in Alaska could increase the intrastate cost allocation by, in large measure, eliminating the effect of distance as a factor in application of the separations procedures.

[85] The Ozark Plan for revised jurisdictional separations procedures was adopted by the Commission in 1970, and included allocation factors that, in many cases, increased the allocation of exchange company costs to the interstate jurisdiction. *See* Separations Procedures, 26 FCC 2d 247 (1970).

[86] Elimination of relative state and interstate average length of haul as a factor in separations would substantially increase Alascom's intrastate cost allocation.

[87] These subsidy mechanisms could lead to uneconomic facility duplication by encouraging competitive entry by carriers based on the subsidy mechanism rather than a competitive marketplace analysis.

[88] *See infra* paras. 82-83.

[89] ATU also raises separations arguments, contending that the Ozark separations procedures should be applied to Alaska for an additional five years since those procedures were not implemented in Alaska until five years after the procedures became effective in the contiguous states. *See* ATU Reply Comments at 8. However, adoption of this proposal, by itself, would not prevent significant shifts in jurisdictional cost allocations if major changes in the Alaska market structure were implemented. Accordingly, this proposal would not adequately address our revenue requirement neutrality concerns.

[90] Although equal access balloting has already taken place in many urban areas in Alaska, the restructuring of the Alaska market would create a new service environment. Thus, Plan A proposes a new round of balloting to select an interexchange carrier for Alaska residents.

[91] For example, the useful life of the Aurora and Telstar satellites is expected to end in the early 1990's.

[92] For example, parties are to provide an estimate of any changes in costs of service which may result due to implementation of either plan. Where it is not possible to fully quantify these changes, parties are requested to approximate the range of improvement and/or detriment.

[93] *See supra* para. 43 and 45.

[94] As stated previously, Alascom will be expected to file a formal cost allocation proposal if cost allocation rules are necessary to implement the market structure adopted.

[95] *See supra* note 31.

[96] *See supra* note 8.

[97] For this purpose, Alascom may use its Form M report, and GCI may use its 10-K report filed with the Securities and Exchange Commission.

[98] *See* GCI and Alascom Responses to Order Requesting Data and Inviting Comments, filed July 15, 1986. *See also* Integration of Rates and Services, FCC 86J-2 (released May 9, 1986).

[99] *See* Order Inviting Comments and Request for Data, CC Docket 86-297, FCC 86J-4, (released July 15, 1986). We will analyze data using a computer model of the B Separations Manual to determine the existance and extent of any revenue requirement shifts. Separations data for 1987 is to be submitted on the Part 31/Part 67 Conformity Spreadsheet (Version 2.4B), and the 1988 data is to be supplied on the Part 32B/B Manual Conformity Spreadsheet (Version 1.65). *See* Appendix C for information on how to obtain these spreadsheets.

[100] On December 24, 1986, Alascom filed a motion asking this Joint Board to require that AT&T file data on the cost of providing interstate and intrastate interLATA telecommunication service to remote locations in the contiguous states to allow comparison of these data with the cost of service to rural or remote areas in Alaska. ATA filed in support of Alascom's motion. AT&T opposed Alascom's motion, asserting that the data requested by Alascom is irrelevant to this proceeding and that such data is not available to AT&T because most of the variation in the cost of service in the contiguous states involves access service provided by the exchange carriers. In light of our tentative conclusion, discussed in a previous section of this Order, that the continuation of full Alaska rate integration and the avoidance of revenue requirement shifts between the jurisdictions should be among our objectives in this proceeding, we believe that this information is not necessary at this time for development of our recommendations. Thus, we dismiss Alascom's motion, without prejudice.

[101] *See supra* para. 6.

[102] AT&T Comments at 20, n.2.

[103] Integration of Rates and Services, 62 FCC 2d 693 (1976).

[104] Overnight mail or courier service must be used for delivery of filings to the the Joint Board Commissioner and staff member located in Alaska.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Annual 1989 Access
Tariff Filings

Petitions for Waiver and
Petition for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1988; Released: December 2, 1988

By the Chief, Common Carrier Bureau:

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I. INTRODUCTION

1. On October 3, 1988, the Common Carrier Bureau (Bureau) released an Order establishing the procedures that certain local exchange carriers (LECs) must follow in submitting the summary cost material to support their 1989 annual access tariff filings.[1] Those filings, to be submitted on or before December 30, 1988, must conform to the requirements of the Tariff Review Plan (TRP) detailed in the *Cost Support Order*, to the extent that waivers are not granted. The *Cost Support Order* avers that waiver applications must show good cause for reporting a different level of detail than required and must indicate how the deficiencies that warrant the waiver will be corrected.[2] LECs were required to include all requests for waiver of the *Cost Support Order* and any other waiver requests relating to the December 30 filing in a single petition to be filed not later than November 1, 1988.[3]

2. We received 21 petitions for waiver *(see* Attachment A), 5 comments or oppositions *(see* Attachment B), and 10 replies *(see* Attachment C). The petitions raise questions regarding existing waivers, the 1989 TRP, and other matters. In this Order, we consider each of the waivers. We also establish the modified TRP requirements for the Annual 1989 Access Tariff Filings.

II. WAIVERS CURRENTLY IN FORCE

A. *In General*

3. Several petitioners have requested continuation of waivers currently in force. We generally find that the justifications for these waivers remain applicable, and we accordingly conclude that the waivers should be extended. We emphasize, however, that our grant of these waiver requests is not perfunctory. As we stated, a LEC which seeks a waiver must demonstrate good cause and must indicate how the deficiencies that necessitate the waiver will be corrected.[4] We also strongly encouraged carriers to comply with the requirements as written rather than seeking waivers.[5] Accordingly, the waivers granted herein are predicated on the carriers' justification of their requests. Except as noted, these waiver petitions have not been opposed and the Bureau has found good cause to grant the requested waivers.

4. Certain waiver requests have been submitted for each of the past several years. These are waivers requesting continuation of the $25 special access surcharge, the information surcharge, the separate equal access rate element, and the calculation of message unit credits (MUCs) on a statewide or company-wide basis. Some carriers have requested waivers to aggregate dedicated and common line transport into one local transport rate element. The Commission has already granted a continuing waiver of the

transport rules.[6] Waivers granted regarding these issues shall remain in force pending the adoption of new or revised rules on these subjects. Until that time, carriers need not annually seek their continuation.

B. ***The Special Access Surcharge***

5. Several petitioners request continuation of the waiver of Section 69.115(c) of the Commission's Rules, 47 C.F.R. § 69.115(c), allowing for the use of a special access surcharge.[7] The waiver allows the carrier to set the amount of the special access surcharge at $25 per special access line, and was granted based on a finding that the costs of a study to develop usage estimates, which would be necessary to establish specific surcharge levels, were likely to outweigh the benefits derived therefrom.[8] Bell Atlantic and CBT request elimination of the surcharge.[9] Bell Atlantic argues that such elimination will afford LECs the opportunity to respond better to market conditions and contends that the surcharge has become less important as a revenue producer.[10] CBT contends that since the number of private lines subject to the surcharge has steadily declined, the revenues it generated would be less than the expenses of administering it.[11] The purpose of the special access surcharge is to require that private line users pay a fair share of common line costs when private line customers use local exchange common lines. Elimination of the surcharge and assessment of these costs on other users would contravene both the Commission rule establishing the charge and the purpose behind it. The petitions also show no special circumstances to justify waiver in their cases. The Bell Atlantic and CBT requests are denied. We do find good cause to warrant continuation of the $25 rate. The $25 charge was intended as a substitute for measurement of common line usage, and measurement still appears infeasible. We reiterate that this waiver will remain in force pending resolution of the special access surcharge issues.

C. ***The Information Surcharge***

6. Several petitioners request continuation of the waiver of Sections 69.109, 69.405(a), 69.405(e), and 69.306(b) of the Commission's Rules, 47 C.F.R. §§ 69.109, 69.405(a), 69.405(e), and 69.306(b), so that LECs may continue to recover non-interstate directory assistance information costs via an information surcharge.[12] The waiver, originally granted in the *1985 Waiver Order*,[13] allows the carriers to separate from the information element those white pages costs not incurred in providing interstate directory assistance, and to recover them through a separate information surcharge rate element. For the same reasons we have granted this waiver in the past,[14] we will extend it indefinitely pending further order concerning this issue.

D. ***Equal Access Rate Element***

7. Several carriers request extention of the waiver of Section 69.4(b) of the Commission's Rules, 47 C.F.R. § 69.4(b), so as to continue to maintain a separate rate element for the recovery of equal access costs.[15] We are persuaded that the circumstances which originally justified this waiver continue to exist, namely the need to track equal access costs and assess them on customers to the extent they benefit from equal access. In addition, because this matter is under consideration in an ongoing Rule Making proceeding,[16] we believe that the *statusquo* should be maintained.

E. ***Dedicated and Common Transport***

8. Various LECs have requested continuation of the waiver of the Commission's Rules permitting them to combine charges for dedicated and common transport into a single rate element.[17] This waiver was originally granted in the Transport Waiver Order, CC Docket No. 78-72, Phase I, 97 FCC 2d 834 (1984), and was extended indefinitely in MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, FCC 85-87, released Feb. 27, 1985. Moreover, the *1988 Waiver Order* extended this waiver until further notice.[18] We repeat here that this waiver will remain in effect pending further order.

F. ***Message Unit Credits***

9. Message unit credits (MUCs) adjust for the double recovery that results when customers of an interexchange carrier (IC) are billed by a LEC for message unit costs while those same costs are also included in Feature Group A charges billed the IC by the LEC. Section 69.107 of the Commission's Rules, 47 C.F.R. § 69.107, requires that all LECs calculate MUCs on an exchange-by-exchange basis. Several carriers request extention of the waiver allowing them to calculate MUCs on a statewide or company-wide basis.[19] The Commission has determined that under certain circumstances the LECs should be allowed to calculate MUCs in this manner.[20] We are convinced that this waiver is appropriate for the reasons articulated in the *1988 Waiver Order*.[21] Accordingly, the companies which have so requested may continue to calculate MUCs on a statewide or company-wide basis pending permanent resolution of this issue as long as the use of statewide or company-wide data does not result in understatement of the credits. We also grant CBT's request that it be permitted to develop MUCs based on a representative month.[22]

G. ***Additional Existing Waivers***

10. In addition, US West requests continuation of the waiver granted in the *1988 Waiver Order* [23] regarding the 1.6 to 1 four-wire to two-wire channel termination ratio prescribed for all LECs.[24] We are persuaded that circumstances have not changed so as to warrant denial of the US West waiver petition. The conditional waiver granted US West in the *1988 Waiver Order* will therefore remain in force.

III. WAIVERS OF THE 1989 TARIFF REVIEW PLAN

A. ***In General***

11. The TRP charts appended to this Order *(see* Attachment D) incorporate a number of revisions requested by LECs since release of the *Cost Support Order*. These revisions largely moot many of the proposed waivers, as we discuss in more detail below. These revised, reduced requirements apply to all filing carriers.

12. Several carriers ask that they be allowed to populate various TRP entries with "N/A."[25] Other than as indicated by the revised TRP charts, we will not accept "N/A" designations.

13. In addition, Ameritech expresses concern that the 1989 TRP was released without a complete determination of the data specifications, which define the nature of the data requested.[26] We believe we proffered sufficient in-

formation for carriers to evaluate the requested data, and we note that the updated TRP charts were documented either explicitly or by reference to ARMIS documents (Charts COS-7 and COS-8) or by reference to the Separations Manual (Chart COS-6).

B. ***Tier 2 Companies***

14. Small telephone companies [27] have the option of filing as test year data either historical or prospective data.[28] Historical test year data should consist of annualized data for the first 9 months of 1988. Prospective data should consist of annualized data for the first 9 months of 1989 or, if such data is unavailable, data for calendar year 1989. For small telephone companies that choose a prospective test year, PYCOS data should consist of data for January 1, 1988, to September 30, 1988, annualized.

15. Data for the first nine months of 1988 should generally be available for all LECs, both large and small, which have filed tariffs previously since all such carriers are required to file FCC Form 492 rate-of-return information for 1988 on a quarterly basis. Although Form 492 reports include only summary information, the collection of supporting 1988 cost data is necessary in the preparation of such reports. For small telephone companies that have not previously filed tariffs and elect to base their proposed rates on a prospective test year, we will allow the provision of 1987 PYCOS data if 1988 data are unavailable. Similarly, small telephone companies that have not previously filed tariffs and choose to base their proposed rates on an historical test year may use 1987 as their test year if 1988 data are unavailable.

16. Chillicothe and Bay Springs indicate that they will adopt a prospective test year.[29] Those carriers request, however, that they be permitted to use calendar year 1987 for the PYCOS period. Those carriers have not explained why 1988 data is available for the Commission's Form 492 reports but is not available for PYCOS cost support. Accordingly, we cannot grant these requested waivers at this time.

17. Alltel Illinois and TUECA request a waiver of the requirement that those carriers file as Tier 2A companies. Alltel Illinois notes that it has fewer than 50,000 access lines, the threshold for Tier 2B treatment, but must file as a Tier 2A company because it is an affiliate of Alltel, a NECA subset 2 company.[30] Similarly, TUECA notes that it must file as a 2A company because it is affiliated with one study area which exceeds the 50,000 access line limitation.[31]

18. We have considered the waiver request and a similar request by Alltel in a petition for reconsideration of the *1988 Waiver Order*, and conclude that a waiver to allow the reduced data filing requirements is justified. For the 1989 annual access tariff filing, we will allow a Tier 2 company with fewer than 50,000 access lines but affiliated with LECs having at least 50,000 access lines to file data at the Tier 2B level of detail.[32] These carriers, however, may not use an historic test year as may small telephone companies; such carriers must use a prospective test year and provide PYCOS cost support. If possible, such carriers should use annualized data from April 1, 1989, to December 31, 1989, as the test year. Otherwise, such carriers should use the 1989 calendar year as the test year. PYCOS data should represent the period from January 1, 1988, to September 30, 1988, annualized. For companies that have not filed their own tariffs previously, calendar year 1987 may be used as the PYCOS period if 1988 data is unavailable. In addition, like small telephone companies, these carriers need not provide TRP data in a mechanized format.

19. NECA must provide common line data (both cost and demand statistics) for (1) the total industry; (2) the common line pool; and (3) the traffic sensitive pool. For demand, common line minutes of use should be provided on at least the following level of disaggregation for historical and prospective data: originating premium, originating non-premium, terminating premium, terminating non-premium. For NECA's traffic sensitive pool, traffic sensitive cost and demand data must be provided as well. Although NECA need not provide an historical time series of minutes of use similar to DMD-1 for its common line and traffic sensitive pools, NECA should provide some historical demand information for both the common line and traffic sensitive pool for use as a benchmark in evaluating proposed rates.

C. ***Confidential Information***

20. Several carriers have requested that certain data filed as part of the 1989 TRP be deemed proprietary.[33] We will address those requests in a subsequent order.

D. ***Chart COS - 1 and Addenda***

1. Chart COS-1(H) and (P)

21. Chart COS-1 contains summary cost information for the past year cost of service (PYCOS) period as well as the test year. These data are represented by COS-1(H) (historical) and COS-1(P) (prospective), respectively. The 1989 version of this chart reflects modifications of the 1988 chart, and for the most part carriers request a reversion to the 1988 Chart COS-1.[34] These companies contend that some of the data required by Chart COS-1 is not used in the development of proposed rates and therefore should not be needed to support the annual access tariff filing.[35] In response to certain of the carriers' concerns, we have modified Chart COS-1 (see Attachment D).

22. Several carriers request waiver of the requirement that carriers provide revenues for the State, Nonregulated, Billing and Collection, and Interexchange categories and are particularly concerned about the latter two sets of data.[36] These carriers argue that data other than interstate access revenue data is irrelevant to the upcoming filing and would lead to competitive harm if publicly disclosed. Some also suggest that Billing and Collection and Interexchange be combined into one category or omitted.

23. We agree that prospective revenue and associated items for certain non-access services are not necessary for determination that companies have properly followed the Commission's cost allocations rules. These items have been marked "N/A" in the revised charts (see Attachment D). Historical revenue and associated items for non-access services are necessary, however, to review compliance of PYCOS allocations with the Commission's cost allocation rules. As a result, we are not willing to waive submission of historical non-access revenue items. As we stated in Section III.C, *supra*, we will respond to the carriers' requests for confidentiality in a subsequent order.

24. The petitioners express various other concerns regarding COS-1. Lincoln, NYNEX, and SWB argue that they do not track common line revenues at the level of detail required by Chart COS-1 and request a waiver so that those carriers may submit only a total common line

revenue figure.[37] Similarly, NYNEX asserts that since the calculation of state and federal income tax, net return, and rates of return is dependent on revenue figures, the sub-elements of common line also cannot be provided on an historical, disaggregated basis.[38] We are persuaded by these carriers' arguments and have therefore modified Chart COS-1 in accord with petitioners' suggestions (see Attachment D).

2. Chart COS-1(H) and (P) Addenda

25. Petitioners request various modifications to the Chart COS-1 Addenda, which require the disaggregation of revenue into recurring, non-recurring, and individual case basis (ICB) categories. The petitioners seek elimination of the entire Chart COS-1(H) Addendum[39] and the non-access section of the Chart COS-1(P) Addendum[40] and contend that these requirements are unduly burdensome and will be of little significance in the Bureau's evaluation of rates. The Bureau requested the information contained in the addenda for use in the event that rate adjustment factors (RAFs) are applied only to recurring or non-ICB charges. Since elimination of historical and non-access data will not hinder our ability to calculate RAFs for prospective access rates, we have modified the Chart COS-1 Addenda in conformance with the carriers' requests.

E. ***Chart COS - 2***

26. Chart COS-2 requires certain time series cost data similar to that required by the 1988 TRP. Ameritech requests a waiver of the requirement that it provide total company historical revenue requirement and rate base data.[41] Lincoln requests a waiver of the requirement that it provide quarterly historical data, since it has only recently converted to performing quarterly cost studies.[42] We grant Ameritech's request to the extent indicated by the modified version of Chart COS-2 (see Attachment D). Lincoln should file that quarterly cost data which it can reasonably develop before the filing date. To the extent development of such data is not possible, Lincoln should file annual data.

F. ***Chart COS - 3***

27. Chart COS-3 includes various items of interstate access cost data so as to measure their effect on 1989 test year amounts. Similar data were required in 1988, and the LECs generally do not object. US West claims that the Chart COS-3 requirements would be unduly burdensome given the December 30 deadline.[43] US West thus requests a 30-day extension to comply with Chart COS-3. We do not grant this extension. The Bureau will need the full review period to evaluate this information properly.

G. ***Chart COS - 4***

28. Chart COS-4 is a "report card" for the 1987 and 1988 test years. Forecasts from the 1987 and 1988 annual access filings are compared to actual data for 1987 and PYCOS period data.[44] The chart also requires reporting of the 1989 test year forecast for comparison to the PYCOS data.[45] Nevada Bell requests a waiver of the requirement that it file 1987 data because it was a NECA participant at that time and therefore did not file its own TRP.[46] We grant Nevada Bell this waiver only to the extent that it did not provide NECA forecasts of 1987 costs for use in NECA's 1987 annual access tariff filing. Nevada Bell must file the required information for 1988.

H. ***Chart COS - 5***

29. Chart COS-5 requires historical and prospective figures for equal access revenues, expenses and taxes, and rate base. Ameritech argues that total company data are irrelevant to assessment of the proposed rates.[47] We believe that total company data are important for adequate assessment of proposed rates. Therefore, we will allow carriers to indicate "N/A" for certain prospective total company equal access data entries only to the extent indicated in the revised chart (see Attachament D).

30. Contel contends that it is unable to provide the Chart COS-5 data because it does not separately identify and track equal access revenues and expenses.[48] It asserts that it had no reason to do so because the Bureau waived the requirement that it expense non-capital equal access costs as those costs are incurred.[49] We require that Contel provide Chart COS-5 data to the extent that it is available, and we note that Contel of Texas provided these data last year in response to the 1988 Chart COS-7.

I. ***Charts COS - 6, 7, and 8***

31. Chart COS-6 includes the summary model of Part 36 developed by the Commission (the Separations Summary Model, or SESAME user input module). Chart COS-7 requires total company cost analysis, including the removal of non-regulated costs, adjustments, and costs subject to jurisdictional separations requirements. Chart COS-8 requires interstate costs analysis, including the allocation of interstate costs among the access elements.

32. Several LECs requesting waivers of Charts COS-7(H) and COS-8(H) assert that these charts duplicate ARMIS[50] data companies must file on April 1, 1989. Those LECs request that we waive the requirement that LECs file these data by December 30, and instead use the data they file on April 1 for ARMIS.[51] Such waivers are denied. Receipt of this information on April 1, 1989, would be of no use to our review of the annual access filings since the rates become effective on April 1, 1989. Carriers seeking waivers of this requirement have not presented any persuasive argument for delay in their provision of these data. We conclude, therefore, that any such delay would materially impede our review process.

33. In addition, several carriers request waiver of the requirements of Charts COS-6(H) and COS-8(H) that LECs annualize nine individual months of data and instead suggest that LECs provide data for a single representative month.[52] The use of one representative month's data in Chart COS-6(H) is acceptable as long as the carriers select a month in which current separations procedures were used. Chart COS-8, however, must display information for the full PYCOS period (nine months' annualized data).

34. Some carriers ask us to waive Chart COS-6 altogether. Some protest that they need to review the Bureau's SESAME model,[53] and some claim that completing the new chart by December 30 will be unduly burdensome.[54] We are unpersuaded that the carriers cannot file Chart COS-6 based on the information we have provided them. Furthermore, we have substantially alleviated the difficulties posed by Chart COS-6 by allowing carriers to use a representative month for the historical data and by

refraining from requiring that carriers submit data for Chart COS-6 in a mechanized or uniform format.[55] Centel requests that it be allowed to file its detailed Part 36 separations study results for each of its operating companies instead of the specific Chart COS-6 data requested.[56] As stated in the *Cost Support Order*, LECs are free to provide their own separations studies provided that such studies are substantively equivalent to Chart COS-6. A carrier needs no waiver to do so.

35. Many petitioners also request that Charts COS-7 and COS-8 be revised to conform more closely with the information carriers must file in the ARMIS proceeding. For example, CBT asks that the column headings for Charts COS-7 and COS-8 be made consistent with ARMIS Appendices C and D, respectively.[57] Similarly, GTOC seeks permission to submit Chart COS-7 and Chart COS-8 data in the format established by ARMIS Appendices C and D.[58] NYNEX objects to the disaggregation of COS-7 data into "Solely Assigned" and "Allocated" categories.[59] NYNEX therefore asks that it be permitted to use the ARMIS categories for Chart COS-7.[60] We note that Chart COS-7 has been reworked so as to resolve the objection raised by NYNEX. We are not willing, however, to revise Charts COS-7 and COS-8 so as to make them identical to the current version of ARMIS Appendices C and D. We have designed these charts to resemble ARMIS as closely as possible but to provide the requisite cost support for tariff review purposes. Furthermore, Appendices C and D are currently subject to modification by the Bureau.[61]

36. In addition, several carriers object to the level of detail required by Charts COS-7 and COS-8. Centel requests a waiver of the requirement that it provide budget information for the test year.[62] Lincoln requests that these charts be waived, and finds especially burdensome the requirement that companies forecast state and local revenues.[63] Pacific asks that we waive Chart COS-7(P) because it requires too great a level of detail and because the data forthcoming in response to Chart COS-1(P) will satisfy the Bureau's needs.[64] Pacific argues that although it may be able to create data for COS-7(P) by applying a ratio to the corresponding historical data, such an exercise would be "meaningless."[65] Pacific similarly argues that the level of disaggregation required by Chart COS-8(P) is unavailable and is not mandated by the Commission's Part 36 Rules.[66] Nevada Bell concurs with Pacific but asks that in the alternative it be permitted to provide the information required by Chart COS-7(P) at the Class B level of detail described in the Uniform System of Accounts (USOA).[67] Similarly, GTOC objects to the level of detail required by Charts COS-7 and COS-8 and requests permission to file the Class B level of accounts.[68] Ameritech, Rochester, and US West also object to the level of detail required by Charts COS-7 and COS-8.[69]

37. Although we are mindful of the various difficulties the carriers cite, we need the data mandated by Charts COS-7 and COS-8 to evaluate the annual access tariff filings properly. The data to be submitted in Chart COS-1(P) are not an acceptable substitute for Chart COS-7(P) and Chart COS-8(P). We reiterate here that we have already given the LECs flexibility in their submission of these charts by not requiring that the charts be filed in a uniform, mechanized format.[70] We will not require carriers to provide forecasts of state, total company, or other non-access revenues, or items derived from revenues. For Chart COS-8, to the extent that Part 69 of the Commission's Rules permits allocations at a lesser level of detail than Part 36, allocations made pursuant to the Part 69 Rules may be displayed at the Part 69 level of detail. Allocations made pursuant to Part 36 must still be shown at the Part 36 level of detail.

38. We will not accept further modifications of Charts COS-7 and COS-8. Nor will we allow carriers to provide the requested information at the USOA Class B level of detail. If we so permit, Charts COS-7 and COS-8 would not offer significantly more information than Chart COS-1. As we stated in the *Cost Support Order*, data provided at a lesser level of detail than required by these charts have proven inadequate for the assessment of the carriers' proposed rates.[71]

J. *Chart DEP - 1*

39. Chart DEP-1 requests depreciation data and remains substantially unchanged from the 1988 version. Several LECs seek waivers of this chart so as to provide this information pursuant to Part 32 of the Commission's Rules rather than Part 31.[72] These waiver requests are unopposed. The chart as originally released incorrectly requested Part 31 information. We modify Chart DEP-1 to require these data in the Part 32 format.

K. *Chart DMD - 1*

40. Chart DMD-1 requires historical, normalized demand data. Several carriers object to the version of this chart presented in the *Cost Support Order*, and request that we abide by the references we made to 1989 data requirements in the 1988 TRP Order.[73] Specifically, LECs oppose the service (MTS, WATS, FX, and 800) disaggregation and customer (AT&T, OCCs, and Total Industry) disaggregation indicated in Chart DMD-1 as well as the requirement that LECs provide derived demand data at these levels of disaggregation from 1984.[74] We have revised Chart DMD-1 to take into account problems that the LECs have brought to our attention. The version appended to this Order (see Attachment D) requires data at a lower level of disaggregation than previously required. We emphasize, however, that these revisions may not remain in force next year. We expect LECs to develop monthly demand information at the level of disaggregation originally requested, and dating back to July 1984.

L. *Chart DMD - 3*

41. Chart DMD-3 acts as a "report card" for the 1987 and 1988 test years in that it compares demand forecasts with actual demand for these years. Similar to its argument in relation to Chart COS-4, Nevada Bell submits that it was a NECA participant in 1987 and consequently did not file a 1987 TRP.[75] Nevada Bell therefore requests a waiver of the DMD-3 requirement that it file information for 1987. We grant Nevada Bell this waiver only to the extent that it did not provide NECA with forecasts of 1987 demand for use in NECA's 1987 annual access tariff filing.

M. *Chart DMD - 4*

42. Chart DMD-4 requires the provision of special access demand data. Many petitioners claim that they relied on the assertions in the *1988 TRP Order* regarding the 1989 TRP. These petitioners emphasize that the *1988 TRP Order* provided that the historical period would date from

1987, not from 1986 as required by this chart.[76] In accord with these requests, we have revised Chart DMD-4 (see Attachment D).

43. In addition, GTOC submits that it does not maintain billing records by special access circuit.[77] GTOC argues that it records billing based on the billable part of the circuit, and that these items cannot be combined into an identifiable circuit.[78] GTOC thus requests a waiver of the requirement that it provide circuit information for Chart DMD-4. GTOC similarly requests a waiver of the requirement that it provide data for temporary video and daily program audio on an historical basis.[79] GTOC claims that this information is not available. If our analysis of GTOC's proposed rates requires these data, GTOC should be prepared to submit the data during the review period. CBT argues that it maintains the data required by Chart DMD-4 on a quarterly basis and asks that it be permitted to provide such data on a quarterly basis for the entire historical period.[80] We will not permit CBT to do so since it was forewarned in the *1988 TRP Oraer* that we would require this information on a monthly basis.

44. Several carriers also question the inclusion of DS3 information for Chart DMD-4. Chart DMD-4 requires the provision of circuits, channel terminations, and channel mileage demand data for all special access services, including DS3 sevices. Ameritech, NYNEX, SWB, and US West claim that they offer DS3 services on an ICB basis and thus are unable to provide the DS3 information required by Chart DMD-4. Those LECs request that that section of the chart be waived.[81] We realize that this information may be difficult to obtain for those carriers that price DS3s on an ICB basis, but we find these data necessary to our evaluation of proposed special access rates. Nonetheless, we will accept from the LECs offering DS3 services as ICBs either (1) circuit information; or (2) both channel terminations and mileage. If we need the residual information during our review of the annual access tariff filings, these carriers should be prepared to provide it. These data must be provided whether or not DS3 circuits are offered on an ICB basis.

N. *Chart DMD - 5*

45. Chart DMD-5 requests common line revenue and demand data and remains substantially unchanged from the 1988 version. Lincoln observes that the Commission did not distinguish between originating and terminating carrier common line during the first two quarters of 1986 and that subscriber line charges have not been levied on WATS lines since the second quarter of 1986.[82] It requests a waiver so as to populate these rows of Chart DMD-5 with "N/A." We have modified Chart DMD-5 in accord with Lincoln's suggestion.

O. *Chart RTE - 2*

46. Some carriers that offer DS3 services on an ICB basis request that they be permitted to exclude these rates from Chart RTE-2.[83] As noted on the revised chart (see Attachment D), no company should provide ICB rates for Chart RTE-2. Carriers anticipating implementation of a rate structure change so as to make a general offering of such services instead of an ICB offering also need not provide the prospective information required by Chart RTE-2.[84] In addition, we grant Lincoln's request that it be permitted to populate Chart RTE-2 with "N/A" for those services which it does not provide or did not provide in the time specified.[85]

IV. OTHER WAIVER REQUESTS

A. *The Message Station Recovery Charge*

47. Bell Atlantic and Pacific request a waiver of the requirement that LECs recover message station equipment costs associated with special access services via assessment of a message station equipment recovery charge (MSRC) on each special access line subject to the special access surcharge.[86] Bell Atlantic asserts that the elimination of the special access surcharge would render the message station equipment charge a nullity, and thus requests permission to assign message station equipment costs to the common line element.[87] Since we have not eliminated the special access surcharge,[88] Bell Atlantic's argument is without merit. Pacific requests permission to include message station equipment costs in the development of its special access channel termination rates.[89] It argues that this would ease any upward rate pressure on customers ordering non-exempt special access lines and would have a minimal impact on channel termination rates.[90] We conclude however, that no persuasive reason has been offered in support of the elimination of the MSRC, and we therefore deny these waiver requests.

B. *Lead - Lag Studies*

48. Centel and Rochester seek waiver of the requirement that carriers perform lead-lag studies, which involve analysis of the effect of the delay between billing and collection to determine cash working capital. Centel wants to conduct only the revenue portion of the study and use the expense lag factor of the BOCs to calculate its cash working capital requirements.[91] Rochester also wants to use the BOC figure.[92] Both carriers argue that the expenses of such a study would outweigh any benefit derived therefrom.[93] We are persuaded by these arguments and therefore grant the requested waivers.

C. *Amortization of Equal Access Costs*

49. CBT and Chillicothe request waiver of the requirement that carriers amortize equal access expenses over an eight-year period and instead seek permission to expense equal access costs in the year they are incurred.[94] They argue that the equal access costs remaining are so slight as to have a minimal effect on rates if this requirement is waived.[95] These requests are accounting waivers rather than waivers of access charge, TRP, or tariff rules. Those waiver requests will be addressed in a separate order.

D. *Transitional Pool Support Payments*

50. Centel and United note their intention to use AT&T's Jurisdictional Traffic Separations System (JTSS) to calculate Feature Group C terminating minutes for access billing.[96] Centel requests a waiver of Section 69.112(b)(2) of the Commission's Rules, 47 C.F.R. § 69.112(b)(2), while United seeks a waiver of Section 69.112(b)(1), 47 C.F.R. § 69.112(b)(1). Centel asserts that the support it pays to the NECA common line pool could be reduced by approximately $1 million if JTSS-based terminating and originating factors are applied to the 1988 revenue requirements used to derive the level of its transitional support payment.[97] If the JTSS-based factors are not used, Centel notes, the calculation of its payment would require an increased revenue requirement and higher carrier common line rates in its 1989 access tariff and could thus lead to bypass.[98] Centel therefore seeks

permission to use the JTSS-based factors in the calculation of its transitional support payments to the NECA pool.

51. United similarly asserts that JTSS will result in higher rate levels and could encourage uneconomic bypass.[99] United therefore requests that the Bureau instruct NECA to calculate the level of transitional support for United "using restated 1988 access minutes and revenues that reflect the new [terminating and originating] factors that will actually be used to bill AT&T in 1989."[100]

52. We do not find that these carriers have presented sufficient justification for grant of the requested waiver. The transitional pool support mechanism is intended to operate through the use of accurate figures regarding terminating minutes. In this situation, we believe it impractical to make such a retroactive change because it will have an unanticipated adverse effect on the rates which other companies charge. These waiver requests are therefore denied.

E. ***Zero Originating Carrier Common Line Charge***

53. Bell Atlantic and US West request permission to maintain the originating carrier common line charge at zero.[101] Those LECs submit that this would discourage uneconomic bypass[102] and would avoid rate churn.[103] US West adds that shifting carrier common line costs to terminating minutes would deter bypass because it is more difficult to engage in bypass at the terminating end of calls.[104] The Bureau concludes that Bell Atlantic and US West have shown no special circumstances to justify the zero originating carrier common line charge. Their request is therefore denied.

F. ***Revenue Accounting Expense***

54. CBT requests a waiver of interim rule Section 36.380 relating to separations procedures for the "Other Billing and Collections" subcategory of Revenue Accounting Expenses.[105] CBT notes that the Commission has ordered that beginning January 1, 1989, expenses for this subcategory should be separated consistent with the interim rule rather than the current rule, and argues that this represents a reversion to the procedure previously mandated by Part 67 of the Commission's Rules.[106] CBT asserts that the current rule is less complex than the interim rule, that it comports more closely with the Commission's cost causation principles, and that use of the current rule would minimize confusion and the administrative burdens of converting to a new, permanent rule.[107] We believe that CBT has advanced no persuasive reason or special circumstances for departure from the *August 8 Order*, and we consequently deny this waiver request.

G. ***Rate Structure Changes***

55. Several carriers request waiver of Section 69.3(a) of the Commission's Rules, 47 C.F.R. § 69.3(a), so as to implement rate structure changes in their annual filings. Bell Atlantic requests authority to modify its current rate structure for switched access non-recurring charges so as to use a "first and additional" rate structure.[108] It notes that while the current structure charges an equal amount per installation regardless of the number of installations, it wishes to implement a system which will "reflect the economies incident to multiple circuit installations."[109] MCI "reluctantly recommends" that this request be granted since that will create a more efficient, less discriminatory structure.[110] We conclude that this proposed arrangement appears reasonable and will allow Bell Atlantic to include it in its annual access tariff filing. In addition, SWB requests a waiver of Section 69.3(a) so as to file revisions to its Tariff No. 68 in accord with carrier common line depooling.[111] Because we have instructed carriers to implement depooling in these tariffs, a waiver is not necessary and SWB and other carriers may include the necessary tariff revisions in these filings.

56. Bell Atlantic, NYNEX, SWB, and US West request waiver of Section 69.3(a) in the event those LECs decide to make a general offering of certain DS3 special access services currently offered on an ICB basis.[112] Although these carriers advocate the continued use of ICB rates for DS3s, they note that they are considering other options.[113] We grant this waiver for all carriers, especially in light of the pending ICB investigation.[114] We direct the carriers' attention to the TRP requirements contained in Sections III.M and O, *supra* (Charts DMD-4 and RTE-2, respectively) regarding such rate structure changes.

H. ***Additional Requests***

57. Centel requests a waiver of Section 69.3(e) of the Commission's Rules, 47 C.F.R. § 69(e), to permit Centel-Iowa to withdraw from the NECA end user pool on April 1, 1989.[115] Centel asserts that it did not withdraw Iowa from the end user pool as of August 30, 1988, in order to keep the company in the pool from January 1, 1989, through April 1, 1989.[116] Due to the recent change in access tariff filing schedules, Centel asserts that the effective date of Iowa's election to remain in the pool has been extended and thus requests an additional opportunity to withdraw.[117] The Bureau finds that Centel-Iowa's withdrawal will not detrimentally affect the end user pool, and we grant Centel's request.

58. Nevada Bell requests a waiver of Section 61.131 of the Commission's Rules, 47 C.F.R. § 61.131, to concur in the carrier common line provisions of Pacific's tariff.[118] We believe this a reasonable request and hereby grant such a waiver.

59. Rochester enumerates several specific waiver requests. First, Rochester requests that it and the four carriers that concur in its traffic sensitive access tariff be permitted to file individual TRPs based on each company's traffic sensitive costs, revenues, and demand.[119] Similarly, because Rochester intends to withdraw all of its operating subsidiaries from the NECA pools, it requests permission to file carrier common line and end user data on a company-specific basis for its affiliates.[120] These requests appear reasonable and are hereby granted. Next, Rochester notes that it has recently acquired Seneca-Gorham Telephone Company, one of the four companies concurring in its tariff which has traditionally filed as a Tier 2B Company.[121] Rochester requests that Seneca-Gorham be permitted to file as a Tier 2B Company this year due to the limited time between its acquisition by Rochester on October 24, 1988, and the December 30 deadline.[122] We also find this request reasonable and will allow Seneca-Gorham to file as a Tier 2B Company for the 1989 filing only.

60. In addition, Rochester notes that five of its subsidiaries are average schedule companies and seeks to permit these companies to continue to settle on an average schedule basis with the Rochester carrier common line pool beginning April 1, 1988.[123] If the petition it filed on

August 19, 1988, is granted, Rochester proposes to submit on a consolidated basis for all five companies the same TRP information concerning carrier common line and end user costs, revenues, and demand that NECA provides for its average schedule companies.[124] If the August 19 petition is denied, Rochester intends to provide carrier common line and end user information on a prospective basis but asserts that it has no historical cost records by virtue of the companies' status as average schedule companies. Rochester requests a waiver to file information for these companies based on the resolution of the August 19 petition.[125] We will permit Rochester to so file.

61. Rochester also observes that while it informed NECA of its companies' withdrawal from the carrier common line pool, it neglected to tell NECA of its intention to likewise withdraw from the end user pool.[126] Accordingly, it requests a waiver to withdraw from the end user pool. We deem this a reasonable request and hereby grant such a waiver. We also grant US West's similar request regarding the El Paso Telephone Company.[127]

62. United argues that implementation of the new separations procedures contained in Section 36.125(f) of the Commission's Rules, 47 C.F.R. § 36.125(f), will cause a substantial interstate-to-state revenue requirement shift in Oregon.[128] United notes that to lessen the impact of such a shift, the Commission adopted the Joint Board recommendation that the Category 3 revisions be phased in over a five-year period.[129] To further minimize the impact of these changes, United notes that the Commission adopted a plan whereby LECs serving 50,000 access lines or fewer would weight their interstate Dial Equipment Minutes of Use (DEM) with a factor determined by the number of access lines in service.[130] United notes that it currently serves fewer than 50,000 access lines in Oregon and has applied a weighting factor of 2.0.[131] United anticipates that its Oregon study area will surpass the 50,000-line threshold in 1991 and it will therefore no longer apply the weighting factor.[132] United submits that this will result in a dramatic cost shift from interstate to state and thus seeks permission "[t]o provide for a more workable transition" by applying a 1.0 weighting factor beginning in 1989.[133] The Bureau believes such a waiver would not be appropriate.

63. Vista requests a waiver of the requirements of MTS and WATS Market Structure, Docket 78-72, Phase I, FCC 85-149, released Apr. 23, 1985 (*April 23 Order*), and Tariff Revisions Filed by the National Exchange Carrier Association and Various Bell Operating Companies, Memorandum Opinion and Order, FCC 85-6564, released Aug. 23, 1985 (*August 23 Order*). Vista notes that the *April 23 Order* required that non-premium flat rate charges be eliminated and that all non-premium access services be billed on a usage-sensitive basis.[134] It observes that the *August 23 Order* required that a single-number surrogate be developed for use at non-measured end offices rather than the two-tier measurements in effect.[135] It adds that the data for calculating this single-number surrogate were to be developed exclusively from traffic patterns in the non-measured end offices.[136] Vista requests a waiver so as to use the assumed minutes of use for non-measured Feature Group A lines and Feature Group B trunks listed in NECA's Tariff F.C.C. No. 5. Vista submits that it will be filing its first interstate access tariff this year and anticipates equal access conversion in all end offices by the end of 1989 that will enable it record all access usage.[137] As long as Vista will in the future bill based on actual minutes, the Bureau grants the waiver requested by Vista for the upcoming access tariff filing.

V. UNIVERSAL SERVICE FUND AND LIFELINE ASSISTANCE

64. The Commission's current Rules require that programs to assist high cost exchange carriers and low income households be funded by a charge assessed on all interexchange carriers that have at least 1 percent of all presubscribed lines on a nationwide basis, or at least 5 percent of all presubscribed lines in day one study area and a minimium of one thousand presubscribed lines in that study area. 47 C.F.R. § 69.116 and 69.117 (1987). This charge is computed and assessed by NECA based on data submitted to NECA by the LECs. The Commission has recently proposed to revise these Rules, in order to correct apparent anomalies in the designation of interexchange carriers subject to the charge and to apply the charge only to interexchange carriers with more then .05 percent of nationwide presubcribed lines. Amendment of Part 69 of the Commission's Rules Relating to the Assessment of Charges for the Universal Service Fund and Lifeline Assistance, NPRM, CC Docket Nos. 78-72, 80-286, FCC 88-364, released November 9, 1988. For purposes of the annual filing, NECA may assume that the proposed revisions will be adopted although changes in the proposed rules may of course require corresponding changes in the final tariff provisions.

VI. CONCLUSION; ORDERING CLAUSES

65. Each company shall submit its annual filing pursuant to the specifications enumerated in paragraph 49 of the *Cost Support Order*. Copies of this waiver Order will be sent directly to USTA. The Bureau will request USTA to distribute copies of the Order to all carriers that will file their own access tariffs on December 30, 1988. A copy of this Order and all attachments will be available for inspection in the Tariff Division of the Federal Communications Commission, Room 518, 1919 M Street, N.W., Washington, D.C. The Commission will distribute copies of the main text of this Order as well as Attachments A through C. Parties may obtain copies of Attachment D only through the Commission's contractor for public records duplication, International Transcription Service, 2100 M Street, N.W., Washington, D.C. 20037 ((202) 857-3800).

66. IT IS ORDERED that the petitions for waiver of the requirements of the Annual 1989 Access Tariff Filing filed November 1, 1988, and other waiver requests referenced in the preceding paragraphs, ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

67. IT IS FURTHER ORDERED that the petition for reconsideration filed by Pacific Bell IS GRANTED to the extent indicated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Commission Requirements for Cost Support Material To Be Filed with 1989 Annual Access Tariffs, DA 88-1554, Order, released Oct. 3, 1988 (*Cost Support Order*).

[2] *Id.* at para. 44.

[3] Pacific and Nevada Bell filed November 2, Bell Atlantic, SWB, and US West filed supplements to their petitions on November 14, November 10, and November 10, respectively.

[4] *Cost Support Order* at para. 44.

[5] *Id.*

[6] MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, FCC 85-87, Memorandum Opinion and Order, released Feb. 27, 1985, at para. 11.

[7] Ameritech Petition at 3; CBT Petition at 5; GTOC Petition at 3; Lincoln Petition at 11-12; Pacific Petition at 3-4; Rochester Petition at 5; SNET Petition at 12; SWB Petition at 7-8; US West Petition at 5-6; SWB Reply at 2. *Accord* NECA Comments at 1-3.

[8] *See* Petitions for Waiver Concerning 1985 Annual Access Tariff Filings, Mimeo No. 5007, released June 7, 1985, at para. 50 (*1985 Waiver Order*).

[9] Bell Atlantic Petition at 8; CBT Petition at 4; Bell Atlantic Reply at 2; CBT Reply at 1-3. *Contra* AT&T Opposition at 9 n.**.

[10] Bell Atlantic Petition at 8.

[11] CBT Petition at 4.

[12] *Id.* at 2; Ameritech Petition at 2; Bell Atlantic Petition at 6; Lincoln Petition at 12; Pacific Petition at 6; Rochester Petition at 2.

[13] *1985 Waiver Order* at para. 76.

[14] *See, e.g.*, Annual 1988 Access Tariff Filing Petitions for Waiver, 3 FCC Rcd 5659, 5660 (1987) (*1988 Waiver Order*).

[15] Bell Atlantic Petition at 7; CBT Petition at 3; Pacific Petition at 6-7; Rochester Petition at 5-6; SWB Petition at 2 n.5; US West Petition at 4-5.

[16] MTS and WATS Market Structure, CC Docket No. 78-72, Notice of Proposed Rule Making, 2 FCC Rcd 254 (1987).

[17] Bell Atlantic Petition at 1 n.3; CBT Petition at 2; Lincoln Petition at 13; Pacific Petition at 5; Rochester Petition at 3-4; SWB Petition at 2 n.5.

[18] *1988 Waiver Order*, 2 FCC Rcd at 5660.

[19] Bell Atlantic Petition at 5; CBT Petition at 3-4; Pacific Petition at 2-3; SWB Petition at 2 n.5; US West Petition at 3-4.

[20] Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase II, 2 FCC Rcd 1416 (1987).

[21] *1988 Waiver* Order, 2 FCC Rcd at 5660.

[22] *See CBT Petition* at 3.

[23] *See 1988 Waiver Order*, 2 FCC Rcd at 5661.

[24] US West Petition at 6-7.

[25] *See, e.g.*, Alltel Illinois Petition at 2-3; Bell Atlantic Petition, Attachment A at 1; CBT Petition at 13; GTOC Petition at 12-13; Pacific Petition at 25.

[26] Ameritech Petition at 4.

[27] "Small telephone companies" are defined in the *Cost Support Order* as well as in Regulation of Small Telephone Companies, CC Docket No. 86-467, 2 FCC Rcd 3811 (1987).

[28] *See* Section 61.39 of the Commission's Rules, 47 C.F.R. § 61.39.

[29] Chillicothe Petition at 1-2; Bay Springs Petition at 2-5.

[30] Alltel Illinois Petition at 1.

[31] TUECA Petition at 1-2.

[32] It should be noted that this waiver concerns only to the type of TRP the carrier must file. It is not a waiver of eligibility requirements for filings under Section 61.39 of the Commission's Rules, 47 C.F.R. § 61.39.

[33] *See, e.g.*, Bell Atlantic Petition, Attachment A at 2; Centel Petition at 9-10; CBT Petition at 13-14; Contel Petition at 4-5; GTOC Petition at 4-5; Lincoln Petition at 2-7; NYNEX Petition at 5; Pacific Petition at 15-16; Rochester Petition at 28-29; SNET Petition at 3-5; United Petition at 5-6; US West Petition at 13-15, 19, 23-24; CBT Reply at 3; Rochester Reply at 11-12; SNET Reply at 2-3; US West Reply at 5-6, 7; United Reply at 3-4. *Contra* MCI Opposition at 5, 7-8.

[34] *See, e.g.*, Ameritech Petition at 6; Contel Petition at 3.

[35] *See, e.g.*, Ameritech Petition at 6; Ameritech Reply at 2.

[36] Centel Petition at 9-10; Contel Petition at 3-4; Pacific Petition at 15-16; United Petition at 6; US West Petition at 19; Pacific Reply at 8-9; US West Reply at 5. *Contra* AT&T Opposition at 8-9.

[37] Lincoln Petition at 10; NYNEX Petition at 2-3; SWB Petition at 4.

[38] NYNEX Petition at 3.

[39] *See* Alltel Illinois Petition at 2; Ameritech Petition at 6-7; Bell Atlantic Petition, Attachment A at 3; BellSouth Petition at 5; CBT Petition at 10; Contel Petition at 5; GTOC Petition at 6; NYNEX Petition at 3; Pacific Petition at 14-15; Rochester Petition at 23-24; US West Petition at 19; Pacific Reply at 11-12. *See also* SWB Reply at 5-6 (requests partial waiver of the Chart COS-1(H) Addendum). *Contra* MCI Opposition at 10.

[40] Ameritech Petition at 6; Rochester Petition at 24; US West Petition at 19.

[41] Ameritech Petition at 7.

[42] Lincoln Petition at 7.

[43] US West Petition at 20; US West Reply at 4, 7. *Contra* AT&T Opposition at 7; MCI Opposition at 8-10.

[44] *See Cost Support Order* at para. 21.

[45] *Id.*

[46] Nevada Bell Petition at 16.

[47] Ameritech Petition at 7.

[48] Contel Petition at 5.

[49] *Id.* at 5-6.

[50] *See* Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies, CC Docket No. 86-182, Order on Reconsideration, FCC 88-311, released Oct. 14, 1988 (*October 14 ARMIS Order*).

[51] Bell Atlantic Petition, Attachment A at 2; CBT Petition at 11; Centel Petition at 12; Lincoln Petition at 8; Pacific Petition at 21-24; Rochester Petition at 22; SNET Petition at 6-7; Pacific Reply at 6, 10-11; SNET Reply at 2. *Contra*, AT&T Opposition at 4; MCI Opposition at 10.

[52] Ameritech Petition at 7; Bell Atlantic Petition, Attachment A at 3-4; BellSouth Petition at 7; GTOC Petition at 7-8, Ameritech Reply at 2-3; Pacific Reply at 8 n.15. MCI states that it does not oppose this request as long as LECs select the most representative month available and are held to that choice. MCI Opposition at 12.

[53] Centel Petition at 10-11; Pacific Petition at 16-17; SNET Petition at 11; Pacific Reply at 7. *Accord* Pacific Petition for Reconsideration at 5-6.

[54] Centel Petition at 11-12; Lincoln Petition at 8; Pacific Petition at 16-17; Rochester Petition at 19-20; US West Petition at 20-21; Rochester Reply at 3-4. *Contra* AT&T Opposition at 5-6; MCI Opposition at 8-10.

[55] *See Cost Support Order* at para. 20.

[56] Centel Petition at 11-12.

[57] CBT Petition at 11.

[58] GTOC Petition at 8.

[59] NYNEX Petition at 4.

[60] *Id.*

[61] *See generally October 14 ARMIS Order.*

[62] Centel Petition at 12-13.

[63] Lincoln Petition at 8-9.

[64] Pacific Petition at 17-20; Pacific Reply at 9-10. *Accord* Pacific Petition for Reconsideration at 7-9.

[65] Pacific Petition at 20.

[66] *Id.* at 24-25; Pacific Reply at 3-5.

[67] Nevada Bell Petition at 18 n.32.

[68] GTOC Petition at 8-9.

[69] Ameritech Petition at 4-5; Rochester Petition at 21; US West Petition at 22-23; Rochester Reply at 4-7; US West Reply at 2-3. *Contra* AT&T Opposition at 2-4 (Chart COS-8); MCI Opposition at 8-10, 11.

[70] *See Cost Support Order* at para. 20.

[71] *Cost Support Order* at para. 19.

[72] Ameritech Petition at 7-8; Bell Atlantic Petition, Attachment A at 4; BellSouth Petition at 8; CBT Petition at 11; GTOC Petition at 12; Lincoln Petition at 10; NYNEX Petition at 5; Pacific Petition at 13-14; US West Petition at 2-6.

[73] Commission Requirements for Cost Support Material To Be Filed With 1988 Annual Access Tariffs, 3 FCC Rcd 978 (1987) (*1988 TRP Order)* at 979.

[74] *See* Bell Atlantic Petition, Attachment A at 3; BellSouth Petition at 3-4; CBT Petition at 12; Centel Petition at 13-14; Contel Petition at 6-7; GTOC Petition at 9-10; Lincoln Petition at 9; NYNEX Petition at 6-8; Pacific Petition at 9-11; Rochester Petition at 12-17; SNET Petition at 7-10; US West Petition at 24-25; United Petition at 2-4; Ameritech Reply at 4; Rochester Reply at 7-9. *Accord* Pacific Petition for Reconsideration at 3-5. *Contra* MCI Opposition at 8-10.

[75] Nevada Bell Petition at 12-13.

[76] Ameritech Petition at 8; Bell Atlantic Petition, Attachment A at 4; BellSouth Petition at 4; CBT Petition at 12; Centel Petition at 13-14; Contel Petition at 7-8; GTOC Petition at 11-12; Lincoln Petition at 9; NYNEX Petition at 9-10; Pacific Petition at 12; Rochester Petition at 18; SNET Petition at 7-8; US West Petition at 25; United Petition at 4-5; SNET Reply at 2.

[77] GTOC Petition at 10.

[78] *Id.*

[79] *Id.* at 11.

[80] CBT Petition at 12.

[81] Ameritech Petition at 8-9; NYNEX Petition at 9-10; SWB Petition at 6-7; US West Petition at 25; Ameritech Reply at 4; SWB Reply at 6-8. *Contra* MCI Opposition at 13.

[82] Lincoln Petition at 11.

[83] Ameritech Petition at 8-9; NYNEX Petition at 11 n.10; SWB Petition at 7; SWB Reply at 6-7. *Contra*, MCI Opposition at 13.

[84] *See* Section IV.G, *infra*.

[85] Lincoln Petition at 11.

[86] *See* Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part 1; Memorandum Opinion and Order, FCC 84-524, released Nov. 9, 1984, at paras. 69-70.

[87] Bell Atlantic Petition at 10-11. *See also* Bell Atlantic Reply at 2 (elimination of MSRC would have minimal effect on rates). *Contra* AT&T Opposition at 9 n.**.

[88] *See* Section II.B, *supra*.

[89] Pacific Petition at 8.

[90] *Id.*

[91] Centel Petition at 4-9.

[92] Rochester Petition at 26.

[93] Centel Petition at 5-9; Rochester Petition at 27; Rochester Reply at 10. *Contra* MCI Opposition at 13-14.

[94] CBT Petition at 6-7; Chillicothe Petition at 2-5.

[95] CBT Petition at 7; Chillicothe Petition at 4-5.

[96] Centel Petition at 15; United Petition at 8-9. *Contra* Bell Atlantic Comments at 1-3; Ameritech Opposition at 1-9; CBT Reply at 4-5.

[97] Centel Petition at 15.

[98] *Id.*

[99] United Petition at 8-9; United Reply at 1-3, 3 n.1.

[100] *Id.* at 9.

[101] Bell Atlantic Petition at 2-4; US West Petition at 7-10.

[102] Bell Atlantic Petition at 3-4; US West Petition at 8-9.

[103] US West Petition at 9.

[104] *Id.* at 8.

[105] CBT Petition at 7-8.

[106] *Id.* (citing MTS and WATS Market Structure, Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board, CC Docket Nos. 78-72, 80-286, and 86-297, Order on Reconsideration and Supplemental Notice of Proposed Rule Making, FCC 88-216, released Aug. 8, 1988 (*August 8 Order)*).

[107] *Id.* at 8.

[108] Bell Atlantic Petition at 7-8; Bell Atlantic Reply at 1-2.

[109] *Id.*

[110] MCI Opposition at 14-15.

[111] SWB Petition at 8; SWB Reply at 2.

[112] The Bell Atlantic, SWB, and US West requests supplement their original petitions for waiver. Each will de designated "Supplemental Petition." The NYNEX request was included in its November 1 petition.

[113] *E.g.*, Bell Atlantic Supplemental Petition at 2; US West Supplemental Petition at 2.

[114] *See* Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 3 FCC Rcd 2582 (1988).

[115] Centel Petition at 2-4.

[116] *Id.* at 3.

[117] *Id.* at 3-4.

[118] Nevada Bell Petition at 9.

[119] Rochester Petition at 7.

[120] *Id.*

[121] *Id.* at 8.

[122] *Id.* at 9; Rochester Reply at 2 n.1.

[123] *Id.* at 11.

[124] *Id.*

[125] *Id.* at 11-12.

[126] *Id.* at 24-25.

[127] *See* US West Petition at 10-11.

[128] United Comments at 9.

[129] *Id.* at 10 (citing Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Recommended Decision and Order, released Apr. 8, 1987, at para. 43).

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.* at 10-11.

[134] Vista Petition at 1.

[135] *Id.*

[136] *Id.*

[137] *Id.*

ATTACHMENT A

Companies Filing Waiver Petitions November 1, 1988

ALLTEL Illinois, Incorporated (Alltel)[1]
The Ameritech Operating Companies (Ameritech)
Bay Springs Telephone Company, Incorporated,
Elkhart Telephone Company,
Merrimack County Telephone Company,
Granite State Telephone, and
Taconic Telephone Corporation (Bay Springs)
The Bell Atlantic Telephone Companies (Bell Atlantic)[2]
The BellSouth Telephone Companies (BellSouth)
Central Telephone Company (Centel)
Chillicothe Telephone Company (Chillicothe)
Cincinnati Bell Telephone Company (CBT)
Contel Corporation (Contel)
The GTE Telephone Operating Companies (GTOC)
Lincoln Telephone and Telegraph Company (Lincoln)
Mountain States Telephone and Telegraph Company,
Northwestern Bell Telephone Company, and
Pacific Northwest Bell Telephone Company (US West)[3]
Nevada Bell[4]
The New York Telephone Company and
the New England Telephone and Telegraph Company (NYNEX)
Pacific Bell (Pacific)[5]
Rochester Telephone Corporation (Rochester)
The Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (SWB)[6]
Telephone Utilities Exchange Carrier Association (TUECA)
The United Telephone System Companies (United)
Vista-United Telecommunications (Vista)[7]

FOOTNOTES FOR ATTACHMENT A

[1] Also filed application for review.

[2] Bell Atlantic filed a supplemental petition on November 10, 1988, to allow for the rate structure changes necessary to implement a general offering of DS3 services in its annual 1989 access tariff filing.

[3] US West filed a supplemental petition on November 10, 1988, to allow for the rate structure changes necessary to implement a general offering of DS3 services in its annual 1989 access tariff filing.

[4] The Nevada Bell petition is identical to the Pacific petition, except for a few additions. Those additions only are mentioned in this Order; all waiver requests attributed to Pacific apply to Nevada Bell as well.

[5] The waiver petition filed November 2, 1988. Pacific also filed a petition for reconsideration.

[6] SWB filed a supplemental petition on November 10, 1988, to allow for the rate structure changes necessary to implement a general offering of DS3 services in its annual 1989 access tariff filing.

[7] Vista requests a waiver of the requirements of MTS and WATS Market Structure, Docket 78-72, Phase I, FCC 85-149, released April 23, 1985 (*April 23 Order*), and Tariff Revisions Filed by the National Exchange Carrier Association and Various Bell Operating Companies, Memorandum Opinion and Order, FCC 85-6564, released August 23, 1985 (*August 23 Order*). Although it does not specifically reference the 1989 TRP, the issues raised by Vista are best addressed in this proceeding.

ATTACHMENT B

Companies Filing Comments or Oppositions to Waiver Petitions November 14, 1988

American Telephone and Telegraph Company (AT&T)
The Ameritech Operating Companies (Ameritech)
The Bell Atlantic Telephone Companies (Bell Atlantic)
MCI Telecommunications Corporation (MCI)
The National Exchange Carrier Association (NECA)

ATTACHMENT C

Companies Filing Reply Comments November 18 - 25, 1988

The Ameritech Operating Companies (Ameritech)
The Bell Atlantic Telephone Companies (Bell Atlantic)
Cincinnati Bell Telephone (CBT)
The Mountain States Telephone and
Telegraph Company, Northwestern Bell
Telephone Company, and Pacific Northwest
Bell Telephone Company (US West)
Nevada Bell[1]
Pacific Bell (Pacific)
Rochester Telephone Company (Rochester)
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (SWB)
The United Telephone System Companies (United)

FOOTNOTE FOR ATTACHMENT C

[1] The Nevada Bell reply is identical to the Pacific reply in most respects and thus all reply comments attributed to Pacific apply to Nevada Bell as well.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements for
Cost Support Material
To Be Filed By Tier 2
Companies with 1989 Annual
Access Tariffs

ORDER

Adopted: December 2, 1988; Released: December 2, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. This Order establishes requirements and releases the charts and documentation for the Tier 2 Tariff Review Plan (TRP). The TRPs display basic cost and demand information in a consistent manner for all Tier 2 local exchange companies (LECs),[1] thereby aiding review by the Bureau and interested parties of the LECs' required annual access tariff filings. The TRPs have served this purpose effectively in past years.

A. *Background*

2. In the *1989 TRP Order*,[2] the Bureau established specific requirements for the Tier 1 TRP and outlined general requirements for the Tier 2 TRP. That Order also provided the rationale underlying our requests for data in the Tier 1 TRP and defined the test year and prior year cost of service (PYCOS) period. Except as indicated herein, the reasons for the requested data and the definition of the test year and PYCOS period also apply to the Tier 2 TRP.

B. *Definition of Tier 2A and Tier 2B Companies*

3. The *1989 TRP Order* preserved the division of the LECs into two categories, Tier 1 operating companies and Tier 2 operating companies, as contained in prior TRP Orders and devised a different set of summary data requirements for each. Tier 2 companies were defined as companies that have total company annual regulated revenue less than $100 million as determined by the 1984 Annual Statistical Volume II of the USTA Statistical Reports of Class A and B Telephone Companies for the Year 1983, and that file their own access tariffs with the Commission. [3] We distinguished the smaller, Tier 2B, LECs from the larger, Tier 2A, LECs by applying the definition of small telephone company study areas adopted in the *Small Telephone Company Order*.[4] Thus, Tier 2B companies are Tier 2 companies which are in National Exchange Carrier Association (NECA) Subset 3 and which serve 50,000 or fewer access lines.[5] These definitions are the same as applied in the *1988 TRP Order*.[6]

C. *Definition of Test Year and Past Year Cost of Service Period*

4. As stated in the *1989 TRP Order*, the Tier 2A companies are subject to the same test period and PYCOS period as the Tier 1 companies. The test year is the last nine months of 1989, annualized, and the PYCOS period is the first nine months of 1988, annualized. Tier 2A companies must use this test year and this PYCOS period.

5. The *1989 TRP Order* established optional cost support requirements for small telephone companies, which are defined in the *Small Telephone Company Order* as Subset 3 companies serving 50,000 or fewer access lines.[7] The *Small Telephone Company Order* allowed small telephone companies to base their rates on historical rather than projected costs. That Order also permitted small companies to compute rates for the first access filing based on a "cost of service study for all elements for the most recent 12-month period with related demand for the same period . . . ."[8]

6. For the 1989 annual access tariff filing, we have waived Section 61.39(b)(1)(i) of the Rules and allowed small telephone companies that choose to use an historical period for the test year to use annualized data for January 1, 1988, to September 30, 1988. If such data are not available, we allowed small telephone companies to use data for calendar year 1987.[9] As discussed in the *1989 Waiver Order*, companies which have filed their own access tariffs before should possess data for January 1, 1988, through September 30, 1988.[10] Therefore, only those small telephone companies which have not previously filed their own access tariffs may use calendar 1987 for their historical test year. Small telephone companies also have the option of filing rates based on the same 1989 test period and PYCOS period adopted for the larger telephone companies.[11]

7. Some small telephone companies have expressed a desire to use a prospective test period but wish to use calendar 1989 for their test year, since they cannot easily forecast operating statistics on a monthly or a quarterly basis.[12] Although we prefer that companies use the annualized nine months of 1989 as the test period, we recognize that this may unduly burden the small companies. Therefore, as stated in the *1989 Waiver Order*, we will allow small telephone companies which choose to file on a prospective basis to use annual data for 1989 as their test year if annualized data for the nine months of 1989 are not available.[13] Also as discussed in the *1989 Waiver Order*, those small telephone companies which choose to file on a prospective basis may use calendar 1987 as their PYCOS period only if they have not previously filed their own access tariffs and if data for January 1, 1988, through September 30, 1988, are not available.[14]

8. In the *1989 TRP Order* we required all small telephone companies to accompany their annual access tariff filing with cost suport data.[15] On further consideration, we have decided to require cost support data from only those small telephone companies which choose to use a prospective test year.

II. TIER 2 TARIFF REVIEW PLAN

9. The *1989 TRP Order* discussed the charts and delineated the data required of the Tier 1 companies. In this section we outline the differences in the charts for Tier 1, Tier 2A, and Tier 2B companies. Attachment A of this Order provides the charts and documentation for the Tier 2A and Tier 2B TRP.

10. The Tier 2A companies are required to file the same data as in Charts COS-1 and COS-4 of the 1989 Tier 1 TRP. As discussed in the *1989 Waiver Order*, we do not require provision of the COS-1(H) Addendum.[16] Charts COS-2 and COS-3 from the Tier 1 TRP are also not required. In addition, we request that Tier 2A companies file charts COS-6, COS-7, and COS-8, although we do not require them to do so. This information will enable us to better evaluate the reasonableness of their rates. The Tier 2A Chart DEP is the same as Chart DEP in the Tier 1 TRP.[17] Charts DMD-1, DMD-2, and DMD-3 are updates of the 1988 Tier 2 Charts DMD-1, DMD-2, and DMD-3. As in the 1988 annual access tariff filing, the DMD charts for both Tier 2A and Tier 2B companies reflect billed rather than normalized demand. The Charts RTE, ERN, and REV are the same as the 1989 Tier 1 TRP, and are required of both Tier 2A and Tier 2B companies. Similarly, "report cards" for cost and demand forecasting, Charts COS-2 and DMD-4 in Attachment A, are required from both the Tier 2A and the Tier 2B LECs.

11. Some companies which, on their own, would qualify as Tier 2B companies are classified as Tier 2A companies because they are affiliated with companies that are NECA Subset 2 or that have study areas of greater than 50,000 access lines. The *1989 Waiver Order* allows companies which would be Tier 2B but for such affiliation to file their TRPs at the Tier 2B level of detail, but they must use a prospective test year and furnish annualized PYCOS data for the first nine months of 1988.[18] As discussed in paragraph 7, *supra*, these affiliated companies may use calendar year 1989 as their test year if they do not forecast on a monthly or quarterly basis.

III. GENERAL INSTRUCTIONS

A. *Waivers*

12. We have already considered various waivers requested by Tier 2 companies in the *1989 Waiver Order*.[19] As a result, and also because the data requirements for Tier 2 carriers are less detailed and more flexible than those for Tier 1 Companies, we do not anticipate that Tier 2 companies will require additional waivers. Nonetheless, in order to permit consideration of any other special circumstances affecting the annual access filings of Tier 2 companies, we will allow them an additional opportunity to file waiver requests. These waiver applications must demonstrate good cause for reporting a different or lower level detail and indicate how the deficiencies justifying the requested waivers will be corrected. Carriers are strongly encouraged to comply with the requirements already established. Omission of individual data items or entries, without request for waiver, will not be permitted. If a Tier 2 carrier determines that it will be unable to meet these requirements, it must file an application for waiver with the Commission no later than December 9, 1988. Each Tier 2 carrier requesting any waiver of the requirements of this Order or of any other Commission rule or Order applicable to the 1989 annual access tariff filings shall include all such requests in a single application. Oppositions are to be filed no later than December 15, 1988. Carriers should not delay development of data required by the 1989 TRP in anticipation that waiver requests will be granted.

13. Some carriers request proprietary protection for certain data. Except as indicated in the *1989 Waiver Order*, we will not allow the filing of any data required by the 1989 Tier 2 TRP under proprietary protection.

B. Compliance With the Paperwork Reduction Act

14. In compliance with the Paperwork Reduction Act, we estimate burden-hours and place the Office of Management and Budget form number and date on the formats included with this Order. We also note that this TRP was developed after receiving recommendations from LECs and other industry representatives, and after comments were filed in response to our *August 10 Public Notice*.[20]

IV. CONCLUSION; PROCEDURAL REQUIREMENTS

15. Copies of this Order will be sent directly to USTA. The Bureau will request USTA to distribute copies of the Order to all Tier 2 carriers that will file their own access tariffs on December 30, 1988. A copy of the Order and all attachments will be available for inspection in the Tariff Division of the Federal Communications Commission, Room 518, 1919 M Street, N.W., Washington, D.C. While the Commission will distribute copies of the main text of this Order, parties may obtain copies of Attachment A only through the Commission's contractor for public records duplication, International Transcription Service, 2100 M Street, N.W., Washington, D.C. 20037 ((202) 857-3800).

16. Each company shall submit its TRP separately from other portions of its tariff filing. Each TRP should be filed in a separate Volume 1-2 accompanying Volume 1 of the Description and Justification, and should be arranged by study area rather than by chart. Companies should provide an extra copy of their TRPs to the Accounting and Audits Division, Suite 812, 2000 L Street, N.W., Washington, D.C. 20036, on or before December 30, 1988.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] For a definition of Tier 2 LECs, see paragraph 3, *infra*.

[2] Commission Requirements for Cost Support Material To Be Filed with 1989 Annual Acess Tariffs, DA 88-1554, Order, released Oct. 3, 1988 (*1989 TRP Order*).

[3] *See 1989 TRP Order* at para. 10.

[4] Regulation of Small Telephone Companies, 2 FCC Rcd 3811 (1987) (*Small Telephone Company Order*).

[5] *See* 47 C.F.R. § 69.602 for a definition of the subsets that vote separately for NECA directors.

[6] Commission Requirements for Cost Support Material To Be Filed with 1988 Annual Access Tariffs, 3 FCC Rcd 978 (1987) *(1988 TRP Order)*.

[7] *See Small Telephone Company Order*, 2 FCC Rcd at 3812. *See also* 47 C.F.R. §§ 61.39(a), 61.39(b), and 69.602.

[8] *Small Telephone Company Order*, 2 FCC Rcd at 3818. *See also* 47 C.F.R. § 61.39(b)(1)(i).

[9] Annual 1989 Access Tariff Filings, Petitions for Waiver and Petition for Reconsideration, DA 88-1872, Memorandum Opinion and Order, released Dec. 2, 1988 *(1989 Waiver Order)* at para. 15.

[10] *Id.*

[11] *1989 TRP Order* at para. 31.

[12] *See, e.g., Alltel Petition for Waiver of 1989 TRP Order* at 2; Bay Springs Petition for Waiver of *1989 TRP Order* at 2-4.

[13] *1989 Waiver Order* at para. 14.

[14] *Id.* at para. 15.

[15] *1989 TRP Order* at para. 31.

[16] *1989 Waiver Order* at para. 25.

[17] The chart DEP in the *1989 TRP Order* inadvertently included Part 31 accounts. It has been revised to include Part 32 accounts, as indicated on the DEP chart in Attachment A.

[18] *1989 Waiver Order* at paras. 17-18.

[19] The waivers relevant to the Tier 2 TRP include identification of entries in which "N/A"s are allowed (reflected in the charts in Attachment A), additional test year options for Tier 2B companies, and the filing requirements for affiliated companies.

[20] *See* Common Carrier Bureau Solicits Recommendations Regarding Modifications and Improvements to the Tariff Review Plan, DA 88-1257, Public Notice, Mimeo No. 4100, Aug. 10, 1988 *(August 10 Public Notice)*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL EXCHANGE CARRIER ASSOCATION — Transmittal No. 325

Revisions to Tariff F.C.C. No. 5

MEMORANDUM OPINION AND ORDER

Adopted: November 28, 1988; Released: November 30, 1988

By the Chief, Common Carrier Bureau:

1. By the captioned transmittal, the National Exchange Carrier Association (NECA) proposes to reduce the nationally-averaged carrier common line charge (CCLC) from 4.14 cents to 3.39 cents per premium terminating minute of use (MOU) effective December 1, 1988.[1] This rate reduction is designed to reflect the reduction in the portion of NECA's carrier common line (CCL) pool revenue requirement that must be recovered through the common line charge due to the increase in the subscriber line charge that also is scheduled to become effective December 1.[2]

2. MCI Telecommunications Corporation (MCI) has filed a petition to suspend and investigate the proposed tariff revisions. MCI argues that NECA's proposed revenue requirement may contain errors because its support materials present only a broad level of detail. MCI Petition at 1-2. In addition, MCI contends that NECA has understated demand for common line minutes of use during the filing period. [3] *Id.* at 2-3. Finally, MCI argues that NECA has underestimated the number of common lines on which the subscriber line charge will be assessed. *Id. at 3.*

3. In its reply, NECA asserts that its proposed revenue requirement is correct. NECA also contends that the cost support information it has provided is consistent with that which it has provided in its past mid-year filings. Nevertheless, NECA also provides further specific data on the basis of its revenue requirement adjustments. NECA Reply at 2-3. NECA also contends that its demand projection is based on 27 months of actual data and demonstrates that the rate of demand stimulation from past interexchange rate reductions has declined. *Id.* at 3-4. Finally, NECA states that the proposed CCL rate reductions will lower revenues by 50 percent more than needed to account for the increase in the subscriber line charge. NECA also states that net reported end user revenues are within .08 percent of the forecast for the January through August 1988 period and have no effect on the filed CCL rate. *Id.* at 5.

4. The Common Carrier Bureau has reviewed the tariff transmittal and the pleadings filed by MCI and NECA. We find that no sufficient argument has been presented that suspension and investigation of the revisions are warranted at this time.

5. Accordingly, IT IS ORDERED that the petition against National Exchange Carrier Association Tariff F.C.C. No. 5, Transmittal No. 325, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] NECA's transmittal also proposes a corresponding reduction in the non-premium CCLC from 1.86 cents to 1.53 cents per terminating MOU.

[2] The increase in the subscriber line charge from $2.60 to $3.20 per line per month applies to residential, single line business, Centrex CO, and Centrex CO-like dormitory service. In addition, subscriber line charges for "grandfathered" CO services are increased from $4.00 to $5.00 per line per month.

[3] American Telephone and Telegraph Company (AT&T) has expressed the opinion that NECA's demand forecast is understated by a total of approximately 1,211 million minutes of use but that only 75 million minutes will be terminating minutes. AT&T concludes that a demand understatement of this magnitude will have no impact upon the CCL rate in view of the fact that only terminating minutes of use are assessed the common line charge at present. *See* Letter from Robert H. Castellano, Division Manager, Federal Regulatory, AT&T, to Chief, Tariff Division, FCC, Oct. 18, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: December 22, 1988

PROCEDURES FOR ANNUAL 1989 ACCESS CHARGE TARIFFS TO BE FILED ON OR BEFORE DECEMBER 30, 1988

Local exchange carriers (LECs) are required by Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to file new access charge tariffs or revisions to existing tariffs to be effective April 1, 1989[1] on not less than 90 days' notice. Therefore, we anticipate receiving these filings on or before December 30, 1988. In this Public Notice, we provide details on the specific procedures to be followed when submitting these filings to the Commission.

GENERAL

Interested parties are reminded that these filings and the associated review and analysis are *not* part of a docketed proceeding. Therefore, until further notice, all correspondence and pleadings (other than tariff filings) in connection with these filings should *not* bear any docket number but must instead bear the designation "*ANNUAL 1989 ACCESS CHARGE TARIFF FILINGS*." All such correspondence and pleadings must be submitted with an original and 10 copies. A copy must also be served on the Commission's Commercial Contractor, International Transcription Services, Inc., (ITS), Room 246, 1919 M Street, N.W.

TARIFF FILINGS

LECs submitting tariff filings should consult the attached schedule which details the number of copies required and the location to which those copies should be delivered. Carriers are especially reminded that (1) the tariff filing must be accompanied with the appropriate filing fee of $250, and (2) they must serve a copy on ITS. Those annual access filings submitted on or before December 30, 1988 must be delivered to ITS at the Commission in Room 535, 1919 M Street, N.W.

Carriers, whether filing their own individual tariffs or not, are reminded of the customer notification requirements as outlined in Section 61.58(a) (4) of the Commission's Rules, 47 C.F.R. § 61.58(a) (4), concerning rate increases in particular. Carriers are further reminded that the purpose of such notification is to afford any affected customer sufficient opportunity to comment on the tariff filing within the time period established for filing petitions in Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773.

In an effort to facilitate identification and cataloging of the tariff filings, the LECs should:

1. Clearly label any package of revised tariff pages as such, *e.g.*: BELL ATLANTIC, STATE, TRANS. LTR. #XXX, DATE, REVISED TARIFF PAGES. These revised pages or any completely new tariff should *not* be submitted in a binder but should be hole-punched for a 3-ring loose leaf binder.

2. Provide a list identifying all cost support volumes submitted with these revisions and associate the list with the cost volumes *and* the transmittal letter.

3. Clearly label all boxes containing cost support volumes as to their contents, *e.g.*: BELL ATLANTIC, STATE, TRANS. LTR XXX, DATE, VOLS. 1,2,3,4, BOX 1 of 5.

4. Submit cost support material in a 3-ring binder pursuant to Public Notice dated December 13, 1986, DA 86-337, and label the volumes of cost support on the spine of the binder with the name of the carrier, the transmittal number, the subject of the filing, the volume number and the date of the filing. For example: BELL ATLANTIC, TRANS. LTR. #XXX, 1989 ANNUAL ACCESS TARIFF FILINGS, VOL. 2-2 OF 2, DEC. 30, 1988.

5. Each carrier should also submit its respective Tariff Review Plan and Certification in a separately bound package as required by the Order released October 3, 1988, *Commission Requirements for Cost Support Material To Be Filed with 1989 Annual Access Tariffs*, DA 88-1554 and *Commission Requirements for Cost Support Material To Be Filed by Tier 2 Companies with 1989 Annual Access Tariffs*, DA 88-1873, released Dec. 2, 1988.

6. In addition to the paper copies, each Tier 1 and Tier 2A carrier must submit its Tariff Review Plan information in two copies on computer "floppy disks". As indicated in the Attachment to this Notice, one copy of the "floppy disks" should be filed with ITS at the time of filing the Access Tariffs. The second copy should be filed with Mark Uretsky, Tariff Review Branch, in Room 514. While Tier 2B carriers are not required to submit their Tariff Review Plan information on "floppy disks" for the 1989 annual access tariff filing, Tier 2B carriers possessing the capability to file "floppy disks" are encouraged to do so.

PETITIONS AND REPLIES

Petitions concerning these tariffs will be due January 24, 1989, regardless of whether the tariff revisions are submitted on or before December 30, 1988. Replies may be filed only by the publishing carriers and will be due on February 6, 1989. Petitioning parties should reference the general designation as outlined above or the specific tariff and transmittal number, and *not* a docket number. Petitions should be organized where possible so as to present comments in a modular form, section-by-section, for ease of analysis. An original and 10 copies of any petition or reply must be filed with the Commission and a copy must be served simultaneously upon the publishing carrier or petitioner. Additionally, ITS must be served with a copy in Room 246, 1919 M Street, N.W.

Members of the general public may submit one copy of their comments, without regard to form, by letter to the Secretary. These comments should specify that they concern the Annual 1989 Access Tariff Filings or a specific tariff transmittal.

PUBLIC INFORMATION

Tariffs filed with the Commission, related correspondence, petitions, and replies concerning the Annual 1989 Access Charge Tariff Filings may be examined by the public from 1:30-4:30 p.m., Monday through Friday, in Room 513, 1919 M Street, N.W., Washington, D.C.

Copies of tariffs, petitions, and other related filings may be obtained from the Commission's Commercial Contractor, ITS. Parties should contact Wilbur Thomas of ITS at (202) 857-3800.

For further information, contact: Judy Nitsche, Tariff Review Branch (632-5550)

FEDERAL COMMUNICATIONS COMMISSION

FOOTNOTE

[1] The Commission has adopted rule changes which delay the effective date of the 1989 Annual Access tariffs until April 1, 1989, with subsequent years having a scheduled effective date of July 1. *See* Access Tariff Filing Schedule, CC Docket No. 88-326, Report and Order, FCC 88-283, released Sep. 14, 1988.

Attachment

ANNUAL 1989 ACCESS CHARGE TARIFF FILING

NUMBER OF COPIES

OFFICIAL COPIES	TRANS LETTER	REVISED TARIFF PAGES	Tariff Review Plan HARD COPY	Tariff Review Plan DISKETTE	61.38 COST SUPPORT VOL. 1 D&J ONLY	61.38 COST SUPPORT VOL. 1 D&J PLUS REMAINDER OF 61.38 MATERIAL
FEE SECTION ROOM L-18	1	2	-	-	-	-
PUBLIC REFERENCE ROOM ---ROOM 513	1	1	-	-	-	-
ITS - ROOM 535 1919 M ST., N.W.	1	1	1	1	-	1
COURTESY COPIES						
JOHN CIMKO ROOM 518	1	1	-	-	1	-
DANIEL GROSH ROOM 518	1	1	-	-	1	-
ANN STEVENS ROOM 518	1	1	-	-	1	-
JUDY NITSCHE ROOM 514	1	1	-	-	1	-
MARK URETSKY ROOM 514	1	-	2	1	-	2
PEYTON WYNNS ROOM 538	-	-	1	-	-	-
KEN MORAN ACCTG & AUDITS DIVISION 2000 L ST., N.W. ROOM 812	1	1	1	-	-	1

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-175

In the Matter of

Amendment of Section 73.202(b), RM-6248
Table of Allotments,
FM Broadcast Stations.
(Lawrenceburg, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: November 30, 1988; Released: January 6, 1989

By the Deputy Chief, Policy and Rules Division:

1. At the request of Robert W. Wright (petitioner),[1] the Commission considers herein the *Notice of Proposed Rule Making*, 3 FCC Rcd 2506 (1988), proposing the allotment of Channel 248A to Lawrenceburg, Tennessee, as that community's second local FM service. Petitioner filed supporting comments reiterating his intention to apply for the channel. No other comments were received.

2. Petitioner asserts that there would be an overlap of contours between his station at Minor Hill, Tennessee, and the Lawrenceburg proposal. Petitioner states that he is prepared to dispose of the Minor Hill property, if he is the successful permittee for Channel 248A at Lawrenceburg. The petitioner may take the appropriate steps deemed necessary to resolve the problem of contours overlap of his existing station at Minor Hill and the Lawrenceburg station at the application stage.

3. In view of the above, we believe the public interest would be served by the allotment of Channel 248A to Lawrenceburg, as that community's second local FM service. Channel 248A can be allotted to Lawrenceburg in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.4 kilometers (3.4 miles) southwest of the city.[2] The restriction is necessary in order to avoid a short spacing to Station WSIX-FM, Channel 250C at Nashville, Tennessee.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 21, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Lawrenceburg, Tennessee	240A, 248A

5. The window period for filing applications will open on **February 22, 1989,** and close on **March 24, 1989.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner is the licensee of Station WLLX(FM), Channel 221A at Minor Hill, Tennessee.

[2] The restricted site coordinates are 35-12-30 and 87-22-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-51

In the Matter of

Amendment of Section 73.202(b),	RM-6076
Table of Allotments,	RM-6265
FM Broadcast Stations.	
(Evans, Martinez and *Warrenton, Georgia)* [1]	

FIRST REPORT AND ORDER

Adopted: November 18, 1988; Released: January 6, 1989

By the Deputy Chief, Policy and Rules Division:

1. The *Notice of Proposed Rule Making*, 3 FCC Rcd 971 (1988), in this proceeding proposed the allotment of Channel 299A to Evans, Georgia, at the request of Evans Broadcasters. In response, Columbia County Broadcasters (Columbia), licensee of Station WMTZ, Martinez, Georgia, and Harold Hinsley (Hinsley) filed joint comments and counterproposals. Columbia requests the substitution of Channel 299C2 for Channel 232A at Martinez and the modification of its license for Station WMTZ to specify the higher powered channel. Hinsley requests the allotment of Channel 232A to Warrenton, Georgia, as the community's first local FM service.[2] Columbia and Hinsley each stated an intention to apply for their proposed channels at Martinez and Warrenton, respectively, if allotted. No reply comments in response to the counterproposals were received.

2. In a separate *Further Notice of Proposed Rule Making and Memorandum Opinion and Order* in this proceeding, the Commission has sought further comments on the allotment of Channel 299C2 to Martinez and the modification of Columbia's license and denied the request to allot Channel 299A to Evans, Georgia. However, a staff engineering study has found that Channel 226A can be allotted to Warrenton in compliance with the Commission's minimum distance separation requirements without requiring any other changes in the Table of Allotments. [3] Therefore, we believe that there is no reason to delay the initiation of a first local service at Warrenton pending the resolution of the Martinez proposal. According to Hinsley, Warrenton has a population of 2,172 persons and it is the seat of Warren County.

3. Based on the record before us, we believe the public interest would be served by allotting Channel 226A to Warrenton, Georgia, as the community's first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 21, 1989,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Warrenton, Georgia	226A

4. The window period for filing applications will open on **February 22, 1989,** and close on **March 24, 1989.**

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Martinez and Warrenton have been added to the caption.

[2] Public Notice of the filing of the counterproposal was given on April 27, 1988, Report No. 1726.

[3] The coordinates for this allotment are North Latitude 33-24-24 and West Longitude 82-39-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-587

In the Matter of

Amendment of Section 73.202(b), RM-6471
Table of Allotments,
FM Broadcast Stations.
(Comanche, Oklahoma)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 30, 1988; Released: January 6, 1989

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Harold E. Cochran (petitioner), requesting the substitution of Channel 245C2 for Channel 244A at Comanche, Oklahoma, and the modification of its license for Station KDDQ (formerly KHME) to specify operation on the higher powered channel. Petitioner states that it will apply for Channel 245C2, if allotted. Channel 245C2 can be allotted to Comanche in compliance with the Commission's minimum distance separation requirements and can be used at Station KDDQ's present transmitter site.[1]

2. As requested, we shall also propose to modify Station KDDQ's license to specify operation on Channel 245C2. In accordance with Section 1.420(g) of the Commission's Rules concerning adjacent channel upgrades, we shall not accept competing expressions of interest in use of the channel at Comanche or require the petitioner to demonstrate the availability of an additional equivalent channel for use by such interested parties.

3. We believe the public interest would be served by proposing the substitution of Channel 245C2 for Channel 244A at Comanche, Oklahoma, since it could enable Station KDDQ to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Comanche, Oklahoma	244A	245C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 27, 1989,** and reply comments on or before **March 14, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Vincent J. Curtis, Jr., Esq.
Patricia A. Mahoney, Esq.
Frank R. Jazzo, Esq.
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 34-26-12 and West Longitude 97-54-47.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-588

In the Matter of

Amendment of Section 73.202(b), RM-6481
Table of Allotments,
FM Broadcast Stations.
(The Dalles, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 30, 1988; Released: January 6, 1989

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Nugent Broadcasting Corporation (petitioner) requesting the substitution of Channel 249C2 for Channel 249A at The Dalles, Oregon, and the modification of its license for Station KACI(FM) to specify operation on the higher powered channel. Channel 249C2 can be allotted to The Dalles in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.7 kilometers (6.0 miles) northwest to accommodate petitioner's desired transmitter site.[1]

2. We believe the public interest would be served by proposing the substitution of Channel 249C2 for Channel 249A since it could enable Station KACI(FM) to expand its coverage of The Dalles and its environs. As requested, we also propose to modify Station KACI(FM)'s license to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of Channel 249C2 at The Dalles or require the petitioner to demonstrate the availability of an additional equivalent channel for use by such interested parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
The Dalles, Oregon	249A, 283C	249C2, 283C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 27, 1989**, and reply comments on or before **March 14, 1989**, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

J. Dominic Monahan, Esq.
Dow, Lohnes & Albertson
1255-23rd Street, N.W.
Washington, D.C. 20037
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 45-38-54 and West Longitude 121-16-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-589

In the Matter of

Amendment of Section 73.202(b), RM-6482
Table of Allotments,
FM Broadcast Stations.
(Taos, New Mexico)

NOTICE OF PROPOSED RULE MAKING

Adopted: November 30, 1988; Released: January 6, 1989

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Taos Communications Corp. (petitioner), requesting the substitution of Channel 268C2 for Channel 269A at Taos, New Mexico, and the modification of its license for Station KTAO to specify the higher powered channel. We note that petitioner failed to affirmatively state that it would apply for Channel 268C2, if allotted to Taos, and is thus requested to do so in its comments.

2. Channel 268C2 can be allotted to Taos in compliance with the Commission's minimum distance separation requirements with a site restriction of 19.1 kilometers (11.9 miles) south to accommodate petitioner's desired transmitter site.[1] As requested, we shall also propose to modify petitioner's license for Station KTAO to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules, competing expressions of interest in use of the channel at Taos will not be considered and we shall not require the petitioner to demonstrate the availability of an additional equivalent for use by such interested parties.

3. We believe the public interest would be served by proposing the substitution of Channel 268C2 for Channel 269A at Taos, New Mexico, since it could permit expanded service to the community and its environs by Station KTAO. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Taos, New Mexico	260A, 269A	260A, 268C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **February 27, 1989,** and reply comments on or before **March 14, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Frederick W. Finn, Esq.
Brown, Finn & Nietert, Chartered
1920 N Street, N.W., Suite 510
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 36-14-48 and West Longitude 105-39-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-590

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Ravenel and Barnwell, South Carolina) RM-6484

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: November 30, 1988; Released: January 6, 1989

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Coastal Broadcasting, Inc. (petitioner), requesting the substitution of Channel 269C2 for Channel 269A at Ravenel, South Carolina, and the modification of its license for Station WMGL(FM) to specify operation on the higher powered channel. In addition, petitioner requests the substitution of Channel 256A for Channel 269A at Barnwell, South Carolina, and the modification of Radio Station WBAW, Inc.'s license for Station WBAW(FM) to specify operation on the substitute channel. Ravenel and Barnwell are located approximately 109 kilometers apart rather than the required 163 kilometers for co-channel Class A and C2 allotments. Petitioner states that it will apply for Channel 269C2, if allotted to Ravenel.

2. Petitioner states that Ravenel is located in the Charleston, South Carolina, radio market and therefore must compete with the higher powered Class C stations licensed to Charleston and North Charleston. It contends that the upgrading of its facilities would enable it to provide an improved level of service to the residents of Ravenel and also improve Station WMGL(FM)'s competitive posture.

3. Channel 269C2 can be allotted to Ravenel in compliance with the Commission's minimum distance separation requirements with a site restriction 17.2 kilometers (10.7 miles) southwest to accommodate petitioner's desired transmitter site. Channel 256A can be allotted to Barnwell in compliance with the Commission's minimum distance separation requirements and can be used at Station WBAW(FM)'s present transmitter site.[1]

4. We believe the public interest would be served by proposing the substitution of Channel 269C2 for Channel 269A at Ravenel, South Carolina, and the substitution of Channel 256A for Channel 269A at Barnwell, South Carolina. In addition, we shall propose to modify the licenses of Stations WMGL(FM) and WBAW(FM) accordingly. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 269C2 at Ravenel or require the petitioner to demonstrate the availability of an additional equivalent channel for use by such parties. Petitioner has stated its willingness to reimburse Radio Station WBAW(FM) for the costs associated with its change of channel. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Barnwell, South Carolina	269A	256A
Ravenel, South Carolina	269A	269C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **February 27, 1989,** and reply comments on or before **March 14, 1989,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Clifford M. Harrington, Esq.
Fisher, Wayland, Cooper and Leader
1255-23rd Street, N.W., Suite 800
Washington, D.C. 20037
(Counsel to petitioner)

7. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Radio Station WBAW, Inc., licensee of Station WBAW(FM), Barnwell, South Carolina, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 256A as proposed herein instead of the present Channel 269A.

8. Pursuant to Section 1.87 of the Commission's Rules, Radio Station WBAW, Inc. may, not later than **February 27, 1989,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Radio Station WBAW, Inc. to furnish additional information. If Radio Station WBAW, Inc. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date refered to above, Radio Station WBAW, Inc. will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the licensee of Station WBAW as follows: Radio Station WBAW, Inc., P.O. Box 447, Barnwell, South Carolina 29812.

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 269C2 at Ravenel are North Latitude 32-40-40 and West Longitude 80-23-40. The coordinates for Channel 256A at Barnwell are North Latitude 33-13-25 and West Longitude 81-21-35.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-570

In the Matter of

Amendment of Part 1 of the
Commission's Rules and Regulations
Regarding Implementation of the
Debt Collection Act of 1982 and
Related Statutory Provisions

REPORT AND ORDER

Adopted: October 28, 1988; Released: December 23, 1988

By the Commission:

INTRODUCTION

1. The *Notice of Proposed Rule Making* in this proceeding[1] requested comment on proposed rules to implement the Debt Collection Act of 1982, 31 U.S.C. §§ 3701, 3711, 3716-3719; 5 U.S.C. § 5514, and section 2653(a)(1) of the Deficit Reduction Act of 1984, 31 U.S.C. § 3720A. In accordance with those statutory provisions, uniform standards for the implementation of the Debt Collection Act were promulgated by the Department of Justice (DOJ) and the General Accounting Office (GAO),[2] and related regulations were also issued by the Office of Personnel Management. [3] The Commission's rules proposed procedures to be employed for the collection of debts owed to the United States Government, in conformance with the above statutory provisions, standards and related regulations.

2. With respect to the Debt Collection Act, the proposed rules addressed the use of administrative and salary offsets;[4] the reporting of delinquent individual debtors to consumer reporting agencies; the assessment of interest, penalties, administrative costs and other sanctions against delinquent debtors; and the issuance of contracts to private collection services for the recovery of money owed to the United States. Pursuant to the Deficit Reduction Act, the proposed rules also delineated the procedures to be followed in referring delinquent debts to the Department of Treasury for collection by offsets against tax refunds owed to the particular debtor. Further, the rules provided that discharged debts would be reported to the Internal Revenue Service.[5]

DISCUSSION

3. The only comments received in this proceeding were filed by Northwestern Indiana Telephone Company (NITCO). NITCO's comments address only the applicability of the proposed procedures to the recovery of monetary forfeitures imposed by the Commission under sections 503 and 504 of the Communications Act, 47 U.S.C. §§ 503, 504. Specifically, NITCO urges that the proposed rules clarify that the Commission will invoke the proposed procedures only after the judicial review proceedings prescribed in sections 503 and 504 have run their course.

4. We substantially agree with NITCO's recommendation and have modified the final rules accordingly.[6] As we noted in the *NPRM*, it is clear that the procedures prescribed by the Debt Collection Act were designed, among other things, for the collection of monetary forfeitures imposed by the Government.[7] The uniform standards issued by DOJ and GAO, however, clearly provide that debt collection procedures do not overrride other statutes and implementing regulations providing for the collection of particular claims. Thus, the standards prescribe that "laws and regulations that are specifically applicable to claims collection activities of a particular agency take precedence over [the procedures set forth by the standards]." 4 C.F.R. § 101.4. In addition, the uniform standards recite that:

> Nothing contained in this chapter is intended to require an agency to omit, foreclose, or duplicate administrative proceedings required by contract or other laws or regulations.

4 C.F.R. § 101.7. Therefore, it is manifest that because sections 503 and 504 of the Communications Act and the regulations implementing those provisions[8] delineate specific procedures for the collection of forfeitures imposed by the Commission, those procedures must be followed before considering other procedures adopted in this proceeding.[9]

5. In this connection, we also note that the legislative history of the Debt Collection Act does not evince any intent to defeat carefully delineated collection procedures already prescribed by other statutes. Similarly, the provisions of section 2653(a)(1) of the Deficit Reduction Act do not override the procedures in the Communications Act for collection of forfeitures. The tax refund offset program in the Deficit Reduction Act was designed as a voluntary measure, available to federal agencies at their discretion and "to the extent practicable." *See* Omnibus Budget Reconciliation Act of 1977, Pub. L. No. 100-203, § 9402, 101 Stat. 1330-376. There is no evidence that Congress authorized the use of tax refund offsets as a substitute for procedures mandated by other statutes, including sections 503 and 504 of the Communications Act.[10] Accordingly, the amended rules provide that forfeitures will not be collected through tax offsets or other means until the mandatory procedures in the Communications Act have been completed.[11]

6. In sum, once the procedures prescribed by sections 503 and 504 of the Communications Act have become final, the Commission will determine whether the collection of a monetary forfeiture under other debt collection alternatives adopted herein is appropriate. In choosing to collect a forfeiture under any of those alternatives, the Commission will not be required to duplicate any hearing already conducted pursuant to the forfeiture provisions. *See* 4 C.F.R. § 101.7, *supra*.

7. Except for the clarification of proposed rule 1.1905 incorporating the foregoing analysis, we conclude that the rules set forth in the *Notice of Proposed Rule Making* should be adopted as proposed.[12]

ADMINISTRATIVE MATTERS

8. In accordance with the requirements prescribed in 5 C.F.R. § 550.1105, the Commission's final rules concerning salary offsets, Rules 1.1925-1.1935, have been approved by the Office of Personnel Management.

9. The final rules adopted herein have been analyzed pursuant to the Paperwork Reduction Act of 1980 (Pub. L. No. 96-511). In this connection, we find that the rules prescribe no new or modified forms to be submitted by the public. Further, we have determined that these rules will not increase the public's burden concerning the collection, recordkeeping, labeling, disclosure or retention of information.

ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that the attached modifications to the Commission's rules ARE ADOPTED pursuant to the authority contained in sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended (47 U.S.C. §§ 154(i), 154(j), and 303(r)), the Debt Collection Act of 1982 (31 U.S.C. §§ 3701, 3711, 3617-3719; 5 U.S.C. § 5514), and section 2653 of the Deficit Reduction Act of 1984 (31 U.S.C. § 3720A). These rules will become effective [30 days after the publication of this document in the Federal Register].

11. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

FINAL RULES Part 1 – [AMENDED]

Part 1 [Practice and Procedure] of Chapter 1 of Title 47 of the Code of Federal Regulations is amended by adding a new Subpart N as follows:

1. The authority for Subpart N is as follows:

Authority: 47 U.S.C. §§ 154(i), 303(r); 31 U.S.C. §§ 3701, 3711, 3716-3719, 3720A; 5 U.S.C. § 5514; 4 C.F.R. Parts 101-105; 5 C.F.R. Part 550.

2. Subpart N is added to read as follows:

SUBPART N - COLLECTION OF CLAIMS OWED THE UNITED STATES

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1.1952 Interagency requests.

Authority: 31 U.S.C. § 3701; 31 U.S.C. § 3711 *et seq.*; 5 U.S.C. § 5514; 4 C.F.R. Parts 101-105; 5 C.F.R. Part 550

General

1. 1901 Definitions.

(a) The term "administrative offset" means withholding money payable by the United States Government to, or held by the Government for, a person to satisfy a debt the person owes the Government.

(b) The term "agency" means the Federal Communications Commission (Commission) or any other agency of the U.S. Government as defined by section 105 of title 5 U.S.C., the U.S. Postal Service, the U.S. Postal Rate Commission, a military department as defined by section 102 of title 5 U.S.C., an agency or court of the judicial branch, or and an agency of the legislative branch, including the U.S. Senate and the U.S. House of Representatives.

(c) The term "agency head" means the Chairman of the Federal Communications Commission.

(d) The terms "appropriate agency official" or "designee" means the Managing Director of the Commission or such other official as may be named by the Managing Director.

(e) The terms "claim" and "debt" are deemed synonymous and interchangeable. They refer to an amount of money or property which has been determined by an appropriate agency official to be owed to the United States from any person, organization, or entity, except another federal agency. They include amounts owing to the United States on account of loans insured or guaranteed by the United States and all other amounts due the United States from fees, leases, rents, royalties, services, sales of real or personal property, overpayments, fines, penalties, damages, interest, taxes, and forfeitures (except those arising under the Uniform Code of Military Justice), and other similar sources.

(f) The term "creditor agency" means the agency to which the debt is owed.

(g) The term "delinquent" means a claim or debt which has not been paid by the date specified in the agency's written notification or applicable contractual agreement, unless other satisfactory payment arrangements have been made by that date, or, at any time thereafter, the debtor has failed to satisfy an obligation under a payment agreement with the agency.

(h) The term "disposable pay" means that part of current basic pay, special pay, incentive pay, retired pay, retainer pay, or in the case of an employee not entitled to basic pay, other authorized pay remaining after the deduction of any amount required by law to be withheld. Agencies must exclude deductions described in 5 C.F.R. § 581.105(b) through (f) to determine disposable pay subject to salary offset.

(i) The term "employee" means a current employee of the Commission or of another agency, including a current member of the Armed Forces or a Reserve of the Armed Forces (Reserve).

(j) The term "FCCS" means the Federal Claims Collection Standards jointly published by the Justice Department and the General Accounting Office at 4 C.F.R. Parts 101-105.

(k) The term "paying agency" means the agency employing the individual and authorizing the payment of his or her current pay.

(l) The term "referral for litigation" means referral to the Department of Justice for appropriate legal proceedings except where the Commission has the statutory authority to handle the litigation itself.

(m) The term "salary offset" means an administrative offset to collect a debt under 5 U.S.C. § 5514 by deductions(s) at one or more officially established pay intervals from the current pay account of an employee without his or her consent.

(n) The term "waiver" means the cancellation, remission, forgiveness, or non-recovery of a debt allegedly owed by an employee to an agency as permitted or required by 5 U.S.C. § 5584, 10 U.S.C. § 2774, or 32 U.S.C. § 710, 5 U.S.C. § 8346(b), or any other law.

1.1902 Exceptions.

(a) Claims arising from the audit of transportation accounts pursuant to 31 U.S.C. § 3726 shall be determined, collected, compromised, terminated or settled in accordance with regulations published under the authority of 31 U.S.C. § 3726 *(see* 41 C.F.R. Part 101-41).

(b) Claims arising out of acquisition contracts subject to the Federal Acquisition Regulations (FAR) shall be determined, collected, compromised, terminated, or settled in accordance with those regulations. (*See* 48 CFR Part 32). If not otherwise provided for in the FAR system, contract claims that have been the subject of a contracting officer's final decision in accordance with section 6(a) of the Contract Disputes Act of 1978 (41 U.S.C. § 605(a)), may be determined, collected, compromised, terminated or settled under the provisions of this regulation, except that no additional review of the debt shall be granted beyond that provided by the contracting officer in accordance with the provisions of section 6 of the Contract Disputes Act of 1978 (41 U.S.C. § 605), and the amount of any interest, administrative charge, or penalty charge shall be subject to the limitations, if any, contained in the contract out of which the claim arose.

(c) Claims based in whole or in part on conduct in violation of the antitrust laws, or in regard to which there is an indication of fraud, the presentation of a false claim, or a misrepresentation on the part of the debtor or any other party having an interest in the claim, shall be referred to the Department of Justice (DOJ) as only the DOJ has authority to compromise, suspend, or terminate collection action on such claims.

(d) Tax claims are also excluded from the coverage of this regulation.

1.1903 Use of procedures.

Procedures authorized by this regulation (including, but not limited to, disclosure to a consumer reporting agency, contracting for collection services, administrative offset and salary offset) may be used singly or in combination, so long as the requirements of applicable law and regulation are satisfied.

1. 1904 Conformance to law and regulations.

The requirements of applicable law (31 U.S.C. §§ 3701-3719, as amended by Pub.L. 97-365, 96 Stat. 1749) have been implemented in government wide standards: (a) the Regulations of the Office of Personnel Management (5 C.F.R. Part 550) and (b) the Federal Claims Collection Standards issued jointly by the General Accounting Office and the Department of Justice (4 C.F.R. Parts 101-105). Not every item in the above described standards has been incorporated or referenced in this regulation. To the extent, however, that circumstances arise which are not covered by the terms stated in these regulations, the Com-

mission will proceed in any actions taken in accordance with applicable requirements found in the standards referred to in this section.

1.1905 Other procedures; collection of forfeiture penalties.

Nothing contained in these regulations is intended to require the Commission to duplicate administrative or other proceedings required by contract or other laws or regulations, nor do these regulations supercede procedures required by other statutes or regulations. In particular, the assessment and collection of monetary forfeiture penalties imposed by the Commission will be governed initially by the procedures prescribed by 47 U.S.C. §§ 503, 504 and 47 C.F.R. § 1.80. After compliance with those procedures, the Commission may determine that the collection of a monetary forfeiture under the collection alternatives prescribed by this subpart is appropriate but need not duplicate administrative or other proceedings.

1. 1906 Informal action.

Nothing contained in these regulations is intended to preclude utilization of informal administrative actions or remedies which may be available.

1. 1907 Return of property.

Nothing contained in this regulation is intended to deter the Commission from demanding the return of specific property or from demanding, in the alternative, either the return of property or the payment of its value.

1. 1908 Omissions not a defense.

The failure of the Commission to comply with any provision in this regulation shall not serve as a defense to the debt.

Administrative Offset - Consumer Reporting Agencies - Contracting for Collection

1. 1911 Demand for payment.

(a) Written demands for payment shall be made promptly upon a debtor in terms which inform the debtor of the consequences of failure to cooperate. A total of three progressively stronger written demands at not more than 30-day intervals will normally be made unless a response to the first or second demand indicates that a further demand would be futile and the debtor's response does not require rebuttal. In determining the timing of demand letters, the Commission will give due regard to the need to act promptly so that, as a general rule, if it becomes necessary to refer the debt to the Department of Justice for litigation, such referral can be made within one year of the agency's final determination of the fact and the amount of the debt. When necessary to protect the Government's interest (for example, to prevent the statute of limitations, 28 U.S.C. § 2415, from expiring), written demand may be preceded by other appropriate actions under this chapter, including immediate referral for litigation.

(b) The initial demand letter will inform the debtor of: (1) The basis for the indebtedness and the right of the debtor to request review within the agency; (2) the applicable standards for assessing interest, penalties, and administrative costs (Sections 1.1940 and 1.1941 of this subpart) and; (3) the date by which payment is to be made, which normally should be not more than 30 days from the date that the initial demand letter was mailed or hand-delivered.

(c) As appropriate to the circumstances, the Commission may include either in the initial demand letter or in subsequent letters, matters relating to alternative methods of payment, policies with respect to use of consumer reporting agencies and collection services, the agency's intentions with respect to referral of the debt to the Department of Justice for litigation, and, depending on applicable statutory authority, the debtor's entitlement to consideration of waiver.

(d) The Commission will respond promptly to communications from the debtor, within 30 days whenever feasible, and will advise debtors who dispute the debt that they must furnish available evidence to support their contentions.

(e) If, either prior to the initiation of, at any time during, or after completion of the demand cycle, the Commission determines to pursue administrative offset, then the procedures specified in sections 1.1912 and 1.1913 as applicable, will be followed. The availability of funds for offset and the agency's determination to pursue that remedy, release the agency from the necessity of further compliance with paragraphs (a), (b) and (c) of this section. If the agency has not already sent the first demand letter, the agency's written notification of its intent to offset must give the debtor the opportunity to make voluntary payment, a requirement which will be satisfied by compliance with the notice requirements of sections 1.1912 and 1.1913 as applicable.

1. 1912 Collection by administrative offset.

(a) Collection by administrative offset will be undertaken in accordance with these regulations on all claims which are liquidated or certain in amount, in every instance in which such collection is determined to be feasible and not otherwise prohibited.

(1) Whether collection by administrative offset is feasible is a determination to be made by the agency on a case-by-case basis, in the exercise of sound discretion. The Commission will consider not only whether administrative offset can be accomplished practically, but also whether offset is best suited to further and protect all of the Government's interest. In appropriate circumstances, the Commission may give due consideration to the debtor's financial condition and is not required to use offset in every instance in which there is an available source of funds. The Commission may also consider whether offset would tend to substantially interfere with or defeat the purposes of the program authorizing the payments against which offset is contemplated. For example, under a grant program in which payments are made in advance of the grantee's performance, offset will normally be inappropriate. This concept generally does not apply, however, where payment is in the form of reimbursement.

(b) Before the offset is made, a debtor shall be provided with the following: written notice of the nature and amount of the debt, and the agency's intention to collect by offset; opportunity to inspect and copy agency records pertaining to the debt; opportunity to obtain review within the agency of the determination of indebtedness; and opportunity to enter into a written agreement with the agency to repay the debt.

(1) The Commission will exercise sound judgment in determining whether to accept a repayment agreement in lieu of offset. The determination will weigh the Government's interest in collecting the debt against fairness to the debtor. If the debt is delinquent and the debtor has not disputed its existence or amount, the Commission will normally accept a repayment agreement in lieu of offset only if the debtor is able to establish that offset would result in undue financial hardship or would be against equity and good conscience.

(2) In cases where the procedural requirements specified in paragraph (b) of this section have previously been provided to the debtor in connection with the same debt under some other statutory or regulatory authority, such as pursuant to a notice of audit disallowance or pursuant to 47 U.S.C. §§ 503, 504 and 47 C.F.R. § 1.80, the agency is not required to duplicate those requirements before taking administrative offset.

(3) The Commission may not initiate administrative offset to collect a debt under 31 U.S.C. § 3716 more than 10 years after the Government's right to collect the debt first accrued, unless facts material to the Government's right to collect the debt were not known and could not reasonably have been known by the official or officials of the Government who were charged with the responsibility to discover and collect such debts. When the debt first accrued is to be determined according to existing law regarding the accrual of debts, such as under 28 U.S.C. § 2415.

(4) The Commission is not authorized by 31 U.S.C. § 3716 to use administrative offset with respect to: (i) debts owed by any State or local Government; (ii) debts arising under or payments made under the Social Security Act, the Internal Revenue Code of 1954, or the tariff laws of the United States; or (iii) any case in which collection of the claim or type of claim by administrative offset is explicitly provided for or prohibited by another statute.

(5) The Commission may effect administrative offset against a payment to be made to a debtor prior to completion of the procedures required by paragraph (b) of this section if: (i) failure to take the offset would substantially prejudice the Government's ability to collect the debt, and (ii) the time before the payment is to be made does not reasonably permit the completion of those procedures. Such prior offset must be promptly followed by the completion of those procedures. Amounts recovered by offset but later found not to be owed to the Government shall be promptly refunded.

(6) The Commission will obtain credit reports on delinquent accounts to identify opportunities for administrative offset of amounts due to a delinquent debtor when other collection techniques have been unsuccessful.

(c) Type of hearing or review:

(1) For purposes of this section, whenever the Commission is required to provide a hearing or review within the agency, it shall provide the debtor with a reasonable opportunity for an oral hearing when: (i) any applicable statute authorizes or requires the agency to consider waiver of the indebtedness involved, the debtor requests waiver of the indebtedness, and the waiver determination turns on an issue of credibility or veracity; or (ii) the debtor requests reconsideration of the debt and the agency determines that the question of the indebtedness cannot be resolved by review of the documentary evidence; for example, when the validity of the debt turns on an issue of credibility or veracity. Unless otherwise required by law, an oral hearing under this section is not required to be a formal evidentiary-type hearing, although the Commission will carefully document all significant matters discussed at the hearing.

(2) This section does not require an oral hearing with respect to debt collection systems in which determinations of indebtedness or waiver rarely involve issues of credibility or veracity and the agency has determined that review of the written record is ordinarily an adequate means to correct prior mistakes. In administering such a system, the agency is not required to sift through all of the requests received in order to accord oral hearings in those few cases which may involve issues of credibility or veracity.

(3) In those cases where an oral hearing is not required by this section, the agency will make its determination on the request for waiver or reconsideration based upon a "paper hearing," that is, a review of the written record.

(d) Appropriate use will be made of the cooperative efforts of other agencies in effecting collection by administrative offset. Generally, the Commission will not refuse to comply with requests from other agencies to initiate administrative offset to collect debts owed to the United States unless the requesting agency has not complied with the applicable provisions of these standards or the offset would be otherwise contrary to law.

(e) Collection by offset against a judgment obtained by a debtor against the United States shall be accomplished in accordance with 31 U.S.C. § 3728.

(f) Whenever the creditor agency is not the agency which is responsible for making the payment against which administrative offset is sought, the latter agency shall not initiate the requested offset until it has been provided by the creditor agency with an appropriate written certification that the debtor owes a debt (including the amount) and full compliance with the provisions of this section has taken place.

(g) When collecting multiple debts by administrative offset, the Commission will apply the recovered amounts to those debts in accordance with the best interest of the United States, as determined by the facts and circumstances of the particular case, paying special attention to applicable statutes of limitation.

1. 1913 Administrative offset against amounts payable from Civil Service Retirement and Disability Fund.

(a) Unless otherwise prohibited by law, the Commission may request that moneys which are due and payable to a debtor from the Civil Service Retirement and Disability Fund be administratively offset in reasonable amounts in order to collect in one full payment, or a minimal number of payments, debts owed to the United States by the debtor. Such requests shall be made to the appropriate officials of the Office of Personnel Management in accordance with such regulations as may be prescribed by the Director of that Office.

(b) When making a request for administrative offset under paragraph (a) of this section, the Commission shall include written certification that:

(1) The debtor owes the United States a debt, including the amount of the debt;

(2) The Commission has complied with the applicable statutes, regulations and procedures of the Office of Personnel Management; and

(3) The Commission has complied with the requirements of section 1.1912 of this subpart, including any required hearing or review.

(c) Once the Commission decides to request administrative offset under paragraph (a) of this section, it will make the request as soon as practical after completion of the applicable procedures in order that the Office of Personnel Management may identify and "flag" the debtor's account in anticipation of the time when the debtor requests or becomes eligible to receive payments from the Fund. This will satisfy any requirement that offset be initiated prior to expiration of the applicable statute of limitations. At such time as the debtor makes a claim for payments from the Fund, if at least a year has elapsed since the offset request was originally made, the debtor should be permitted to offer a satisfactory payment plan in lieu of offset upon establishing that changed financial circumstances would render the offset unjust.

(d) If the Commission collects part or all of the debt by other means before deductions are made or completed pursuant to paragraph (a) of this section, it shall act promptly to modify or terminate its request for offset under paragraph (a) of this section.

(e) This section does not require or authorize the Office of Personnel Management to review the merits of the Commission's determination with respect to the amount and validity of the debt, its determination as to waiver under an applicable statute, or its determination to provide or not provide an oral hearing.

1. 1914 Collection in Installments.

(a) Whenever feasible, and except as otherwise provided by law, debts owed to the United States, together with interest, penalties, and administrative costs as required by this subpart should be collected in full in one lump sum. This is true whether the debt is being collected by administrative offset or by another method, including voluntary payment. However, if the debtor is financially unable to pay the indebtedness in one lump sum, payment may be accepted in regular installments. The Commission will obtain financial statements from debtors who represent that they are unable to pay the debt in one lump sum. If the Commission agrees to accept payment in regular installments, it will obtain a legally enforceable written agreement from the debtor which specifies all of the terms of the agreement and which contains a provision accelerating the debt in the event the debtor defaults. The size and frequency of installment payments should bear a reasonable relation to the size of the debtor and debtor's ability to pay. If possible, the installment payments should be sufficient size and frequency to liquidate the Government's claim in not more than 3 years. Installment payments of less than $50 per month will be accepted only if justifiable on the grounds of financial hardship or for some other reasonable cause.

(b) If the debtor owes more than one debt and designates how a voluntary installment is to be applied among those debts, that designation must be followed. If the debtor does not designate the application of the payment, the Commission will apply payments to various debts in accordance with the best interests of the United States, as determined by the facts and circumstances of the particular case, paying special attention to applicable statutes of limitations.

1. 1915 Exploration of Compromise.

The Commission may attempt to effect compromise, preferably during the course of personal interviews, in accordance with the standards set forth in Part 103 of the Federal Claims Collection Standards (4 C.F.R. Part 103).

1. 1916 Suspending or Terminating Collection Action.

The suspension or termination of collection action shall be made in accordance with the standards set forth in Part 104 of the Federal Claims Collection Standards (4 C.F.R. Part. 104).

1. 1917 Referrals to the Department of Justice or the General Accounting Office.

Referrals to the Department of Justice or the General Accounting Office shall be made in accordance with the standards set forth in Part 105 of the Federal Claims Collection Standards (4 C.F.R. Part 105).

1. 1918 Use of Consumer Reporting Agencies.

(a) The term "individual" means a natural person, and the term "consumer reporting agency" has the meaning provided in the Federal Claims Collection Act, as amended, at 31 U.S.C. § 3701(a)(3) or the Fair Credit Reporting Act, at 15 U.S.C. § 1681a(f).

(b) The Commission may disclose to a consumer reporting agency, from a system of records, information that an individual is responsible for a claim if -

(1) notice required by section 5 U.S.C. § 552a(e)(4) indicates that information in the system may be disclosed to a consumer reporting agency;

(2) the claim has been reviewed and it is decided that the claim is valid and overdue;

(3) the Commission has notified the individual in writing -

(A) that payment of the claim is overdue;

(B) that, within not less than 60 days after sending the notice, the Commission intends to disclose to a consumer reporting agency that the individual is responsible for that claim;

(C) of the specific information to be disclosed to the consumer reporting agency; and

(D) of the rights the individual has to a complete explanation of the claim, to dispute information in the records of the agency about the claim, and to administrative appeal or review of the claim; and

(4) The individual has not -

(A) repaid or agreed to repay the claim under a written repayment plan that the individual has signed and the agency has agreed to; or

(B) filed for review of the claim under paragraph (g) of this section;

(c) The Commission shall -

(1) disclose promptly, to each consumer reporting agency to which the original disclosure was made, a substantial change in the condition or amount of the claim;

(2) verify or correct promptly information about the claim, on request of a consumer reporting agency for verification of any or all information so disclosed; and

(3) obtain satisfactory assurances from each consumer reporting agency that they are complying with all laws of the United States relating to providing consumer credit information.

(d) The Commission shall ensure that information disclosed to the consumer reporting agency is limited to -

(1) information necessary to establish the identity of the individual, including name, address, and taxpayer identification number;

(2) the amount, status, and history of the claim; and

(3) the agency or program under which the claim arose.

(e) All accounts in excess of $100 that have been delinquent more than 31 days will normally be referred to a consumer reporting agency.

(f) Before disclosing information to a consumer reporting agency, the Commission shall take reasonable action to locate an individual for whom the head of the agency does not have a current address to send the notice.

(g) Before disclosing information to a consumer reporting agency, the Commission shall provide, on request of an individual alleged by the agency to be responsible for the claim, for a review of the obligation of the individual, including an opportunity for reconsideration of the initial decision on the claim.

(h) Under the same provisions as described above, the Commission may disclose to a credit reporting agency, information relating to a debtor other than a natural person. Such commercial debt accounts are not covered by the Privacy Act.

1. 1919 Contracting for collection services.

(a) The Commission has authority to contract for collection services to recover delinquent debts, provided that the following conditions are satisfied:

(1) The authority to resolve disputes, compromise claims, suspend or terminate collection action, and refer the matter for litigation is retained by the agency;

(2) The contractor shall be subject to the Privacy Act of 1974, as amended, to the extent specified in 5 U.S.C. § 552a(m), and to applicable Federal and State laws and regulations pertaining to debt collection practices, such as the Fair Debt Collection Practices Act, 15 U.S.C. § 1692;

(3) The contractor must be required to account strictly for all amounts collected;

(4) The contractor must agree that uncollectible accounts shall be returned with appropriate documentation to enable the Commission to determine whether to pursue collection through litigation or to terminate collection efforts; and

(5) The contractor must agree to provide any data contained in its files relating to paragraphs (a)(1), (2), and (3) of § 105.2 of the Federal Claims Collection Standards (4 C.F.R. Part 105) upon returning an account to the Commission for subsequent referral to the Department of Justice for litigation.

(b) Funding of collection service contracts:

(1) The Commission may fund a collection service contract on a fixed-fee basis, that is, payment of a fixed fee determined without regard to the amount actually collected under the contract. Payment of the fee under this type of contract must be charged to available agency appropriations.

(2) The Commission may also fund a collection service contract on a contingent-fee basis, that is, by including a provision in the contract permitting the contractor to deduct its fee from amounts collected under the contract. The fee should be based on a percentage of the amount collected, consistent with prevailing commercial practice.

(3) The Commission may enter into a contract under paragraph (b)(1) of this section only if and to the extend provided in advance appropriation acts or other legislation, except that this requirement does not apply to the use of a revolving fund authorized by statute.

(4) Except as authorized under paragraph (b)(2) of this section, or unless the receipt qualifies as a refund to the appropriation, or unless otherwise specifically provided by law, the Commission must deposit all amounts recovered under collection service contracts (or by agency employees on behalf of the agency) in the Treasury as miscellaneous receipts pursuant to 31 U.S.C. § 3302.

(c) The Commission will consider the use of collection agencies at any time after the account is 61 days past due. In any case where an account is six months or more past due, the Commission may turn it over to a collection agency unless referred for litigation or unless arrangements have been made for a workout procedure or the Commission has exercised its authority to write off the debt pursuant to section 1.1916.

(d) The Commission will generally not use a collection agency to collect a delinquent debt owed by a currently employed or retired Federal employee, if collection by salary or annuity offset is available.

Salary Offset

1. 1925 Purpose.

This section provides the standards to be followed by FCC in implementing 5 U.S.C. § 5514 to recover a debt from the pay account of an FCC employee, and establishes procedural guidelines to recover debts when the employee's creditor and paying agencies are not the same.

1. 1926 Scope.

(a) Coverage. This section applies to agencies and employees as defined by section 1.1901.

(b) Applicability. This section and 5 U.S.C. § 5514 apply in recovering certain debts by offset, except where the employee consents to the recovery, from the current pay account of that employee. Because it is an administrative offset, debt collection procedures for salary offset which are not specified in 5 U.S.C. § 5514 and these regulations should be consistent with the provisions of the Federal Claims Collection Standards (4 C.F.R. Parts 101-105).

(1) Excluded debts or claims. The procedures contained in this section do not apply to debts or claims arising under the Internal Revenue Code of 1954, as amended (26 U.S.C. §§ 1 *et seq.*), the Social Security Act (42 U.S.C. §§ 301 *et seq.*) or the tariff laws of the United States, or to any case where collection of a debt by salary offset is explicitly provided for or prohibited by another statute (*e. g.* travel advances in 5 U.S.C. § 5705 and employee training expenses in 5 U.S.C. § 4108).

(2) Waiver requests and claims to the General Accounting Office. This section does not preclude an employee from requesting waiver of a salary overpayment under 5 U.S.C. § 5584, 10 U.S.C. § 2774, or 32 U.S.C. § 716, or in any way questioning the amount or validity of a debt by submitting a subsequent claim to the General Accounting Office in accordance with procedures prescribed by the General Accounting Office. Similarly, in the case of other types of debts, it does not preclude an employee from requesting waiver, if waiver is available under any statutory provision pertaining to the particular debt being collected.

(c) Time Limit. Under 4 C.F.R. § 102.3(b)(3) offset may not be initiated more than 10 years after the Government's right to collect the debt first accrued, unless an exception applies as stated in § 102.3(b)(3).

1. 1927 Notification.

(a) Salary offset deductions shall not be made unless the Managing Director of the Commission, or such other official as may be named in the future by the Managing Director of the Commission, provides the employee at least 30 days before any deduction written notice stating at a minimum:

(1) The agency's determination that a debt is owed, including the origin, nature, and amount of the debt;

(2) The agency's intention to collect the debt by means of deduction from the employee's current disposable pay account;

(3) The amount, frequency, proposed beginning date, and duration of the intended deductions;

(4) An explanation of the agency's policy concerning interest, penalties, and administrative costs (Sections 1.1940 and 1.1941 of this regulation), a statement that such assessments must be made unless excused in accordance with the FCCS;

(5) The employee's right to inspect and copy Government records relating to the debt or, if the employee or his or her representative cannot personally inspect the records, to request and receive a copy of such records.

(6) If not previously provided, the opportunity (under terms agreeable to the agency) to establish a schedule for the voluntary repayment of the debt or to enter into a written agreement to establish a schedule for repayment of the debt in lieu of offset. The agreement must be in writing, signed by both the employee and the Managing Director (or designee) of the Commission and documented in agency files (4 CFR § 102.2(e)).

(7) The employee's right to a hearing conducted by an official arranged by the agency (an administrative law judge, or alternatively, a hearing official not under the control of the head of the agency) if a petition is filed as prescribed by this Subpart.

(8) The method and time period for petitioning for a hearing;

(9) That the timely filing of a petition for hearing will stay the commencement of collection proceedings;

(10) That the final decision in the hearing (if one is requested) will be issued at the earliest practical date, but not later than 60 days after the filing of the petition requesting the hearing unless the employee requests and the hearing official grants a delay in the proceedings;

(11) That any knowingly false, misleading, or frivolous statements, representations, or evidence may subject the employee to:

(A) disciplinary procedures appropriate under Chapter 75 of Title 5, United States Code, Part 752 of Title 5, Code of Federal Regulations, or any other applicable statutes or regulations.

(B) penalties under the False Claims Act §§ 3729-3731 of Title 31, United States Code, or any other applicable statutory authority; or

(C) criminal penalties under §§ 286, 287, 1001, and 1002 of Title 18, United States Code, or any other applicable statutory authority.

(12) Any other rights and remedies available to the employee under statutes or regulations governing the program for which the collection is being made; and

(13) Unless there are applicable contractual or statutory provisions to the contrary, that amounts paid on or deducted for the debt which are later waived or found not owed to the United States will be promptly refunded to the employee.

(b) Notifications under this section shall be hand delivered with a record made of the date of delivery, or shall be mailed by certified mail return receipt requested.

(c) No notification, hearing, written responses or final decisions under this regulation are required by the Commission for any adjustment to pay arising out of an employee's election of coverage, or change in coverage, under a Federal benefit program requiring periodic deductions from pay, if the amount to be recovered was accumulated over four pay periods or less.

1. 1928 Hearing.

(a) Petition for Hearing.

(1) A hearing may be requested by filing a written petition with the Managing Director of the Commission, or such other official as may be named by the Managing Director of the Commission, stating why the employee believes the determination of the agency concerning the existence or the amount of the debt is in error.

(2) The employee's petition must be signed by the employee and fully identify and explain with reasonable specificity all the facts, evidence and witnesses, if any, which the employee believes support his or her position.

(3) The petition must be filed no later than fifteen (15) calendar days from the date that the notification was hand delivered or the date of delivery by certified mail, return receipt requested.

(4) If a petition is received after the fifteenth (15) calendar day deadline referred to above, the Commission will nevertheless accept the petition if the employee can show that the delay was due to circumstances beyond his or her control, or because of failure to receive notice of the time limit (unless otherwise aware of it).

(5) If a petition is not filed within the time limit specified in paragraph (3) above, and is not accepted pursuant to paragraph (4) above, the employee's right to hearing will be considered waived, and salary offset will be implemented by the Commission.

(b) Type of Hearing.

(1) The form and content of the hearing will be determined by the hearing official who shall be a person outside the control or authority of the Commission except that nothing herein shall be construed to prohibit the

appointment of an administrative law judge by the Commission. In determining the type of hearing, the hearing officer will consider the nature and complexity of the transaction giving rise to the debt. The hearing may be conducted as an informal conference or interview, in which the agency and employee will be given a full opportunity to present their respective positions, or as a more formal proceeding involving the presentation of evidence, arguments and written submissions.

(2) The employee may represent himself or herself, or may be represented by an attorney.

(3) The hearing official shall maintain a summary record of the hearing.

(4) The decision of the hearing officer shall be in writing, and shall state:

(A) The facts purported to evidence the nature and origin of the alleged debt;

(B) The hearing official's analysis, findings, and conclusions, in the light of the hearing, as to -

(i) The employee's and/or agency's grounds,

(ii) The amount and validity of the alleged debt and,

(iii) The repayment schedule, if applicable.

(5) The decision of the hearing official shall constitute the final administrative decision of the agency.

1. 1929 Deduction from pay.

(a) Deduction by salary offset, from an employee's current disposable pay, shall be subject to the following conditions:

(1) Ordinarily, debts to the United States should be collected in full, in one lump sum. This will be done when funds are available for payment in one lump sum, or, if the amount of the debt exceeds 15 percent of disposable pay for an officially established pay interval, collection will normally be made in installments.

(2) The installments shall not exceed 15 percent of the disposable pay from which the deduction is made, unless the employee has agreed in writing to the deduction of a greater amount.

(3) Deduction will generally commence with the next full pay interval (ordinarily the next biweekly pay period) following the date of: the employee's written consent to salary offset, the waiver of hearing, or the decision issued by the hearing officer.

(4) Installment deductions must be made over a period not greater than the anticipated period of employment except as provided in section 1.1930.

1. 1930 Liquidation from final check or recovery from other payment.

(a) If the employee retires or resigns or if his or her employment or period of active duty ends before collection of the debt is completed, offset of the entire remaining balance of the debt may be made from a final payment of any nature, including, but not limited to, final salary payment or lump-sum leave due the employee as of the date of separation, to such extent as is necessary to liquidate the debt.

(b) If the debt cannot be liquidated by offset from a final payment, offset may be made from later payments of any kind due from the United States, including, but not limited to, the Civil Service Retirement and Disability Fund, pursuant to section 1.1913 of this regulation.

1. 1931 Non - waiver rights by payments.

An employee's involuntary payment of all or any portion of a debt being collected under 5 U.S.C. § 5514 shall not be construed as a waiver of any rights which the employee may have under 5 U.S.C. § 5514 or any other provision of contract or law, unless statutory or contractual provisions provide to the contrary.

1. 1932 Refunds.

(a) Refunds shall promptly be made when -

(1) A debt is waived or otherwise found not owing to the Unted States (unless expressly prohibited by statute or regulation); or

(2) The employee's paying agency is directed by an administrative or judicial order to refund amounts deducted from his or her current pay.

(b) Refunds do not bear interest unless required or permitted by law or contract.

1. 1933 Interest, penalties, and administrative costs.

The assessment of interest, penalties and administrative costs shall be in accordance with sections 1.1940 and 1.1941 of this regulation.

1. 1934 Recovery when paying agency is not creditor agency.

(a) Responsibilities of creditor agency. Upon completion of the procedures established under 5 U.S.C. § 5514, the creditor agency must do the following:

(1) The creditor agency must certify, in writing, that the employee owes the debt, the amount and basis of the debt, the date on which payment(s) is due, the date the Government's right to collect the debt first accrued, and that the creditor agency's regulations implementing 5 U.S.C. 5514 have been approved by OPM.

(2) If the collection must be made in installments, the creditor agency also must advise the paying agency of the number of installments to be collected, the amount of each installment, and the commencement date of the first installment (if a date other than the next officially established pay period is required).

(3) Unless the employee has consented to the salary offset in writing or signed a statement acknowledging receipt of the required procedures, and the written consent or statement is forwarded to the paying agency, the creditor agency also must advise the paying agency of the action(s) taken under 5 U.S.C. § 5514(b) and give the date(s) the action(s) was taken.

(4) Except as otherwise provided in this paragraph, the creditor agency must submit a debt claim containing the information specified in paragraphs (a)(1) through (3) of this section and an installment agreement (or other instruction on the payment schedule), if applicable to the employee's paying agency.

(5) If the employee is in the process of separating, the creditor agency must submit its claim to the employee's paying agency for collection pursuant to § 1.1930. The paying agency must certify the total amount of its collection and provide copies to the creditor agency and the employee as stated in paragraph (c)(1) of this section. If the paying agency is aware that the employee is entitled to payments from the Civil Service Retirement and Disability Fund, or other similar payments, it must provide written notification to the agency responsible for making

such payments that the debtor owes a debt (including the amount) and that there has been full compliance with the provisions of this section. However, the creditor agency must submit a properly certified claim to the agency responsible for making such payments before collection can be made.

(6) If the employee is already separated and all payments from his or her former paying agency have been paid, the creditor agency may request, unless otherwise prohibited, that money due and payable to the employee from the Civil Service Retirement and Disability Fund (5 C.F.R. §§ 831.1801 *et seq.*), or other similar funds, be administratively offset to collect the debt. (31 U.S.C. § 3716 and 4 C.F.R. § 102.4)

(b) Responsibilities of paying agency -

(1) Complete claim. When the paying agency receives a properly certified debt claim from a creditor agency, deductions should be scheduled to begin prospectively at the next officially established pay interval. The employee must receive written notice that the paying agency has received a certified debt claim from the creditor agency (including the amount) and written notice of the date deductions from salary will commence and of the amount of such deductions.

(2) Incomplete claim. When the paying agency receives an incomplete debt claim from a creditor agency, the paying agency must return the debt claim with a notice that procedures under 5 U.S.C. § 5514 and this subpart must be provided, and a properly certified debt claim received, before action will be taken to collect from the employee's current pay account.

(3) Review. The paying agency is not required or authorized to review the merits of the creditor agency's determination with respect to the amount or validity of the debt certified by the creditor agency.

(c) Employees who transfer from one paying agency to another.

(1) If, after the creditor agency has submitted the debt claim to the employee's paying agency, the employee transfers to a position served by a different paying agency before the debt is collected in full, the paying agency from which the employee separates must certify the total amount of the collection made on the debt. One copy of the certification must be furnished to the employee, another to the creditor agency along with notice of employee's transfer. However, the creditor agency must submit a properly certified claim to the new paying agency before collection can be resumed.

(2) When an employee transfers to another paying agency, the creditor agency need not repeat the due process procedures described by 5 U.S.C. § 5514 and this subpart to resume the collection. However, the creditor agency is responsible for reviewing the debt upon receiving the former paying agency's notice of the employee's transfer to make sure the collection is resumed by the new paying agency.

1. 1935 Obtaining the services of a hearing official.

(a) When the debtor does not work for the creditor agency and the creditor agency cannot provide a prompt and appropriate hearing before an administrative law judge or before a hearing official furnished pursuant to another lawful arrangement, the creditor agency may contact an agent of the paying agency designated in Appendix A of 5 C.F.R. part 581 for a hearing official, and the paying agency must then cooperate as provided by 4 C.F.R. § 102.1 and provide a hearing official.

(b) When the debtor works for the creditor agency, the creditor agency may contact any agent (of another agency) designated in Appendix A of 5 C.F.R. Part 581 to arrange for a hearing official. Agencies must then cooperate as required by 4 C.F.R. § 102.1 and provide a hearing official.

Interest, Penalties, and Administrative Costs

1. 1940 Assessment.

(a) Except as provided in paragraph (h) of this section, or section 1.1941, the Commission shall assess interest, penalties and administrative costs on debts owed to the United States pursuant to 31 U.S.C. § 3717. Before assessing these charges, the Commission will mail or hand-deliver a written notice to the debtor explaining the agency's requirements concerning these charges.

(b) Interest shall accrue from the date on which notice of the debt and the interest requirements is first mailed or hand-delivered to the debtor, using the most current address that is available to the agency. If the Commission should use an "advance billing" procedure - that is, if it mails a bill before a debt is actually owed - it can include the required interest notification in the advance billing, but interest may not start to accrue before the debt is actually owed.

(c) The rate of interest assessed shall be the rate of the current value of funds to the United States Treasury (*i.e.*, the Treasury Tax and loan account rate), as prescribed and published by the Secretary of the Treasury in the *Federal Register* and the Treasury Financial Manual Bulletins annually or quarterly, in accordance with 31 U.S.C. § 3717. The Commission may assess a higher rate of interest if it reasonably determines that a higher rate is necessary to protect the interests of the United States. The rate of interest, as initially assessed, shall remain fixed for the duration of the indebtedness except that where a debtor has defaulted on a repayment agreement and seeks to enter into a new agreement, the Commission may set a new interest rate which reflects the current value of funds to the Treasury at the time the new agreement is executed. Interest will not be assessed on accrued interest, penalties, or adminstrative costs required by this section. However, if the debtor defaults on a previous repayment agreement, charges which accrued but were not collected under the defaulted agreement shall be added to the principal to be paid under a new repayment schedule.

(d) The Commission shall assess against a debtor charges to cover administrative costs incurred as a result of a delinquent debt - that is, the additional costs incurred in processing and handling the debt because it became delinquent. Calculation of administrative costs shall be based upon actual costs incurred or upon costs analyses establishing an average of actual additional costs incurred by the agency in processing and handling claims against other debtors in similar stages of delinquency. Administrative costs may include costs incurred in obtaining a credit report or in using a private debt collector, to the extent they are attributable to the delinquency.

(e) The Commission shall assess a penalty charge, not to exceed 6 percent a year, on any portion of a debt that is delinquent for more than 90 days. This charge need not be calculated until the 91st day of delinquency, but shall accrue from the date that the debt became delinquent.

(f) When a debt is paid in partial or installment payments, amounts received by the agency shall be applied first to outstanding penalty and administrative cost charges, second to accrued interest, and third to the outstanding principal.

(g) The Commission will waive the collection of interest on the debt or any portion of the debt which is paid within 30 days after the date on which interest began to accrue. It may extend this 30-day period, on a case-by-case basis, if it reasonably determines that such action is appropriate. Also, the Commission may waive, in whole or in part, the collection of interest, penalties, and/or administrative costs assessed under this section under the criteria specified in Part 103 of the Federal Claims Collection Standards (4 C.F.R. Part 103) relating to the compromise of claims (without regard to the amount of the debt), or if it determines that collection of these charges would be against equity and good conscience, or not in the best interest of the United States. Waiver under the first sentence of this paragraph (g) is mandatory. Under the second and third sentences, it may be exercised under appropriate circumstances. Examples of appropriate circumstances include:

(1) Waiver of interest pending the agency's disposition of a request for reconsideration, administrative review, or waiver of the underlying debt under a permissive statute, and

(2) Waiver of interest where the Commission has accepted an installment plan under section 1.1914, and there is no indication of fault or lack of good faith on the part of the debtor.

(h) Where a mandatory waiver or review statute applies, interest and related charges may not be assessed for those periods during which collection action must be suspended under § 104.2(c)(1) of the Federal Claims Collection Standards (4 C.F.R. Part 104).

1. 1941 Exemptions.

(a) The provisions concerning interest and penalty on claims contained in 31 U.S.C. § 3717 do not apply:

(1) To debts owed by any State or local government;

(2) to debts arising under contracts which were executed prior to, and were in effect on (*i.e.*, were not completed as of), October 25, 1982;

(3) to debts where an applicable statute, regulation required by statute, loan agreement, or contract either prohibits such charges or explicitly fixes the charges that apply to the debts arising under the Social Security Act, the Internal Revenue Code of 1954, or the tariff laws of the United States.

(b) However, the Commission is authorized to assess interest and related charges on debts which are not subject to 31 U.S.C. § 3717 to the extent authorized under the common law or other applicable statutory authority.

1. 1942 Other sanctions.

The remedies and sanctions available to the Commission in this subpart are not exclusive. The Commission may impose other sanctions, where permitted by law, for any inexcusable, prolonged, or repeated failure of a debtor to pay such a claim. In such cases, the Commission will provide notice, as required by law, to the debtor prior to imposition of any such sanction.

Cooperation with the Internal Revenue Service

1. 1950 Reporting discharged debts to the Internal Revenue Service

When the Commission discharges a debt for less than the full value of the indebtedness, it will report the outstanding balance discharged, not including interest, to the Internal Revenue Service, using IRS Form 1099-G or any other form prescribed by the Service, when:

(a) The principal amount of the debt not in dispute is $600 or more; and

(b) The obligation has not been discharged in a bankrupcy proceeding; and

(c) The obligation is no longer collectible either because the time limit in the applicable statute for enforcing collection expired during the tax year, or because during the year a formal compromise agreement was reached in which the debtor was legally discharged of all or a portion of the obligation.

1. 1951 Offset against tax refunds.

The Commission will take action to effect administrative offset against tax refunds due to debtors under 26 U.S.C. § 6402, in accordance with the provisions of 31 U.S.C. § 3720A and Treasury Department regulations.

General provisions concerning interagency requests

1. 1952 Interagency requests.

(a) Requests to the Commission by other Federal agencies for administrative or salary offset shall be in writing and forwarded to the Financial Services Branch, FCC, 1919 M Street, N.W., Washington, D.C. 20554.

(b) Requests by the Commission to other Federal agencies holding funds payable to the debtor will be in writing and forwarded, certified return receipt, as specified by that agency in its regulations. If the agency's rules governing this matter are not readily available or identifiable, the request will be submitted to that agency's office of legal counsel with a request that it be processed in accordance with their internal procedures.

(c) Requests to and from the Commission shall be accompanied by a certification that the debtor owes the debt (including the amount) and that the procedures for administrative or salary offset contained in this subpart, or comparable procedures prescribed by the requesting agency, have been fully complied with. The Commission will cooperate with other agencies in effecting collection.

(d) Requests to and from the Commission shall be processed within 30 calendar days of receipt. If such processing is impractical or not feasible, notice to extend the time period for another 30 calendar days will be forwarded 10 calendar days prior to the expiration of the first 30-day period.

FOOTNOTES

[1] *Amendment of Part 1 of the Commission's Rules and Regulations regarding Implementation of the Debt Collection Act of 1982*, 2 FCC Rcd 7339 (1987), 52 Fed. Reg. 48725 (1987).

[2] The uniform standards are set forth at 4 C.F.R. §§ 101.1-105.5 (1987).

[3] 5 C.F.R. § 550.1101-550.1108 (1987).

[4] "Administrative offset" is the withholding of money owed to, or held for, a person by the Government to satisfy a debt owed by that person to the Government. *See* 31 U.S.C. § 3701(a)(1). "Salary offsets" provide for the recovery of money owed by federal employees to the Government, through deductions against salary or other benefits that accrue from federal employment. *See* 5 U.S.C. § 5514.

[5] The *Notice of Proposed Rule Making* sets forth a fuller explanation of the Commission's proposed rules.

[6] Rather than modifying the definition of "debt," as suggested by NITCO, we have achieved the same result by adding explanatory language to Rule 1.1905, which specifically addresses the use of procedures required by other statutes.

[7] Section 13(b) of the Debt Collection Act, which amended the Federal Claims Collection Act of 1966, 31 U.S.C. § 3701, provides:

> For purposes of [the Federal Claims Collection Act], the term "claim" includes amounts owing on account of loans insured or guaranteed by the United States and all other amounts due the United States from fees, duties, leases, rents, royalties, services, sales of real or personal property, overpayments, fines, penalties, damages, interest, taxes, forfeitures, and other sources.

[8] The specific procedures followed by the Commission in assessing and collecting monetary forfeitures are set forth in 47 C.F.R. § 1.80.

[9] The General Sevices Administration, in consultation with the Department of Justice, similarly determined that Government claims arising out of contracts subject to the Contract Disputes Act of 1978, 41 U.S.C. § 601-613, would be resolved through the dispute-resolution process prescribed by that statute, and not pursuant to the Debt Collection Act provisions. *See* 41 C.F.R. § 105-55.003; 50 Fed. Reg. 37529, 37530 (1985). The Commission also will incorporate that same determination in its own rules. *See* Section 1.1902(b). In addition, claims arising from the audit of transportation accounts conducted pursuant to 31 U.S.C. § 3726 will be collected or settled in accordance with regulations issued under that statute. *See* Section 1.1902(a).

[10] Treasury Department regulations implementing the tax refund offset program do state, however, that the program may be used to facilitate the collection of forfeiture penalties. *See* 31 C.F.R. § 5.25.

[11] We note that section 2653(a)(1) of the Deficit Reduction Act is applicable only to refunds payable after December 31, 1985, and before July 1, 1988. *See* 26 U.S.C. § 6402, note; 31 U.S.C. § 3720A, note. Further, section 9402(c) of the Omnibus Reconciliation Act of 1987 requires that the Comptroller General, in consultation with the Secretary of the Treasury, conduct a study on the operation and effectiveness of the tax refund offset program, with a report to be submitted to Congress no later than April 1, 1989. *See* 26 U.S.C. § 6402, note; 31 U.S.C. § 3720A, note. A bill already reported by the U.S. Senate Finance Committee would extend the program permanently. Thus, we have determined that the best course of action at this juncture is to promulgate our rule implementing section 2653, as proposed. Of course, if the tax refund offset program is not extended, or if it is subsequently repealed, we will take appropriate action to amend our debt collection regulations to reflect the congressional mandate in this matter.

[12] A few, non-substantive editorial changes have been made in the proposed rules to ensure their clarity and accuracy.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Chillicothe Telephone Company and
Cincinnati Bell Telephone Company

Petitions for Waiver of the
Commission's Rules and Regulations
regarding the eight year amortization
period for equal access expenses

ORDER

Adopted: December 20, 1988; Released: December 22, 1988

By the Chief, Common Carrier Bureau:

INTRODUCTION

1. On November 1, 1988, the Chillicothe Telephone Company (Chillicothe) and the Cincinnati Bell Telephone Company (CBT) petitioned for waiver of the eight year amortization period for equal access expenses established by the Commission in its *Memorandum Opinion and Order*, FCC 85-628, released December 9, 1985 (*Equal Access Accounting Order*). [1] For the reasons set forth below, we grant the waiver requests of Chillicothe and CBT.

BACKGROUND

2. In the *Equal Access Accounting Order*, the Commission, among other things, established a rolling eight year amortization period for equal access expenses. Upon reconsideration in *Memorandum Opinion and Order*, FCC 86-470, released November 5, 1986,[2] the Commission decided to change the rolling eight year amortization period to a single eight year amortization period ending on December 31, 1993. Chillicothe and CBT filed the aforementioned waivers as part of the Annual 1989 Access Tariff Filing proceeding. In a *Memorandum Opinion and Order*, DA 88-1872 released December 2, 1988, the Commission acted on other matters but determined that these waivers would be addressed in a separate order.

THE PETITIONS

3. In their petitions, Chillicothe and CBT each request a waiver of the eight year amortization period for recovery of equal access expenses which would permit them to expense these costs in the year they are incurred. Chillicothe states that its incremental equal access expenses for the next four years is expected to be $51,000, and that the average yearly expenses of $10,728 represent less than .29% of its total interstate revenue requirement. Chillicothe states that its equal access expenses will be insignificant, will not pose a barrier to entry for interexchange carriers and will not adversely affect competition. Chillicothe also says that even though incremental expenses associated with administering the eight year amortization are minor, they are of no benefit to the ratepayer, and should not be incurred.

4. In its petition, CBT indicates that it is in the final stages of equal access conversion. By the end of 1988, CBT will have converted 52 of its 57 central offices. CBT says that it is scheduling conversion of the remaining 5 offices in 1989 and 1990. CBT estimates its cost to convert two offices scheduled for 1989 will be $322,000 which is only .5% of its total interstate revenue requirement. Further, CBT estimates that conversion costs for the remaining offices will be even lower. CBT notes that the eight year amortization period was established by the Commission to prevent irregular and significant rate increases resulting from large expenditures incurred in providing equal access. CBT believes its remaining equal access expenses will not have a significant impact and that its conversion costs do not warrant the same level of concern as expenditures incurred by the other Bell Operating Companies. CBT and Chillicothe both pointed out that the Commission has granted requests for waiver under similar circumstances. [3]

DISCUSSION

5. In the *Equal Access Accounting Order*, the Commission established special accounting requirements for equal access expenses to avoid irregular and substantial fluctuations in revenue requirements. Special accounting requirements were needed since, as paragraph 6 of the *Equal Access Accounting Order* states, "there were no specific accounting provisions to cover equal access and network reconfiguration costs in the Uniform System of Accounts (Part 31 of our Rules)."

6. We believe that Chillicothe and CBT have presented sound arguments to support the granting of a waiver from the eight year amortization period for equal access expenses. Both Chillicothe and CBT have shown that their equal access expenses are insignificant in magnitude and that they would have no appreciable effect on rates. Chillicothe's total estimated equal access expenses for the next four years is $51,000. CBT's total estimated equal access expenses for 1989 are $322,000, and their estimate for 1990 is less. In each case, expenses of this magnitude would not have a significant effect upon total access costs. Thus, we grant both Chillicothe and CBT a waiver from the requirement in the *Equal Access Accounting Order*, that equal access expenses be deferred and amortized.

ORDERING CLAUSES

7. Accordingly, IT IS ORDERED, that the petitions for waiver of the Chillicothe Telephone Company and the Cincinnati Bell Telephone Company to expense remaining equal access expenses in the year in which they are incurred ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] 50 FR 50910 (December 13, 1985).

[2] 1 FCC Rcd 434 (1986).

[3] *See* The Centel Companies, Petition for Waiver of the Commission's Rules and Regulations Regarding the Eight-year Amortization Period for Equal Access Expenses, 2 FCC Rcd 1487 (1987); United Telephone System Companies, Petition for Waiver of the Commission's Rules and Regulations Regarding the Eight-year Amortization Period for Equal Access Expenses, 2 FCC Rcd 5104 (1987); GTE Service Corporation, Petition for Waiver of the Commission's Rules and Regulations Regarding the Eight-year Amortization Period for Equal Access Expenses, 2 FCC Rcd 6933 (1987); National Exchange Carrier Association, Inc., Petition for Waiver of Sections 36.19 and 36.421(a) of the Commission's Rules, 3 FCC Rcd 6042 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE BELL ATLANTIC TELEPHONE COMPANIES — Transmittal No. 262

Revisions to Tariff F.C.C. No. 1

Petition for Waiver of Section 69.4(b) of the Commission's Rules

ORDER

Adopted: December 19, 1988; Released: December 23, 1988

By the Chief, Common Carrier Bureau:

1. The above-captioned tariff revisions were filed by the Bell Atlantic Telephone Companies (Bell Atlantic) on September 6, 1988, and are scheduled to take effect on December 24, 1988. These revisions implement an operator transfer service, by which Bell Atlantic would transfer 0- calls to operator services maintained by interexchange carriers (ICs).[1] On September 21, 1988, National Telephone Services (NTS) and US Sprint Communications Company (US Sprint) filed petitions for rejection or in the alternative, suspension and investigation, to which Bell Atlantic replied on September 29, 1988.

2. Under the proposed tariff, operator transfer service would be provided at the request of an end user who dials 0- and needs an interLATA IC operator. If the proposed service is implemented, Bell Atlantic will first ask the end user to dial the call directly. If the caller "insists" on having an operator dial the call, the caller will be asked to designate an IC operator, to whom Bell Atlantic will then transfer the call. If the caller has no preference, the Bell Atlantic operator will read a list of available IC operator services so that the caller can select an IC operator service to which Bell Atlantic can then transfer the interLATA 0- call. The proposed rates will be imposed on any IC that subscribes to the operator transfer service. ICs will be required to have a separate Feature Group D trunk group dedicated to the operator transfer service. Bell Atlantic has also filed a petition for waiver of Section 69.4(b) of the Commission's Rules to establish a rate element for this proposed operator transfer service.

3. US Sprint complains that the tariff is extremely vague as to precisely how the Bell Atlantic operator will handle the calls, and asks how customers will be instructed to dial direct. US Sprint Petition at 3. US Sprint also states that Bell Atlantic should not be permitted to require separate trunk groups without a convincing show of need, and that establishing separate trunk groups is not necessary for tallying the number of calls sent to each IC. *Id.* at 4-6.

4. NTS asserts the Bell Atlantic's proposal is a patent violation of Section 201(b) of the Communications Act and the Commission's presubscription policies. NTS argues that the Commission expects local exchange carriers to devise presubscription procedures for the routing of operator calls. NTS charges that Bell Atlantic's service will in effect prevent the subscriber line from being presubscribed to an IC. NTS Petition at 3. NTS also attacks Bell Atlantic's plan as introducing serious anticompetitive dangers. In its view, Bell Atlantic simply cannot script the remarks of its operators or control operators if they go beyond their given instructions. *Id.* at 5. Finally, NTS advocates rejection of Bell Atlantic's plan as confusing to customers and disruptive of contractual relationships between presubscribed parties and ICs such as hotels and universities. *Id.* at 7.

5. In its reply, Bell Atlantic argues that its operators will not engage in lengthy discussions with customers, but states that detailed tariff specifications about operator conversations would impede customer service and bring no public benefit. Bell Atlantic Reply at 2-4. Bell Atlantic explains that once a customer makes a carrier selection, the operator will honor that request and discontinue reading the list of available carriers. *Id.* at 4. Bell Atlantic states that separate direct Feature Group D trunks are required because the IC must have a connection to the Operator Service Center in order to receive calls, and a separate trunk is necessary for proper billing and provisioning of the service. Moreover, tandem trunking would not allow coin collection capability from coin stations. *Id.* at 5-7. Finally, Bell Atlantic argues that private contracts cited by NTS do not form a basis for rejection of Bell Atlantic's tariff. According to Bell Atlantic, lawful tariffs take precedence over inconsistent contracts. *Id.* at 9.

6. The Common Carrier Bureau has reviewed the tariff transmittal and the submissions filed by the above-listed petitioners and Bell Atlantic.[2] We find that no compelling argument has been presented that the tariff is patently unlawful so as to require rejection and that an investigation of the revisions is not warranted at this time.

7. IT IS THEREFORE ORDERED that the petitions against the Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 262, filed by the above-listed petitioners ARE DENIED.

8. IT IS FURTHER ORDERED that the petition for waiver of Section 69.4(b) of the Commission's Rules, 47 C.F.R. §69.4(b), filed by the Bell Atlantic Telephone Companies IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] "0-" calls are calls made by end users who dial simply 0, rather than 0 followed by a telephone number.

[2] Bell Atlantic recently filed additional information concerning operator instructions and corresponding work time estimates, cost allocation methods, and feasibility of implementing

presubscribed carrier routing. Letters from M. Johns, Bell Atlantic, to A. David, Tariff Review Branch, FCC, Nov. 30, Dec. 1, and Dec. 9, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Enforcement of Prohibitions
Against Broadcast Obscenity and
Indecency in 18 U.S.C. § 1464

ORDER

Adopted: December 19, 1988; Released: December 21, 1988

By the Commission: Commissioner Dennis concurring and issuing a separate statement.

1. On October 1, 1988, the President signed into law Pub. L. No. 100-459, which contains appropriations for the Commission for fiscal year 1989.[1] This legislation also contains the following provision:

> By January 31, 1989, the Federal Communications Commission shall promulgate regulations in accordance with section 1464, title 18, United States Code, to enforce the provisions of such section on a 24 hour per day basis.

2. In compliance with this law, we are adopting a new rule pursuant to which the Commission will enforce the provisions of Section 1464 of the United States Criminal Code on a twenty-four hour a day basis.

3. Under previous interpretations of Section 1464, the Commission and the courts had applied this law to prohibit the broadcast of obscene programming during the entire day and indecent programming only when there was a reasonable risk that children might be in the audience.[2] Initially, the Commission had suggested that this risk might be sufficiently diminished after 10 p.m. to permit broadcasts aired after that time. [3] In a 1987 ruling, however, the Commission stated that its current thinking was that such broadcasts would not be permissible until after 12:00 midnight.[4] Thereafter, the United States Court of Appeals for the District of Columbia Circuit remanded two Commission rulings concerning post-10 p.m. indecent broadcasts in *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (*ACT*), for a further explanation justifying its "new, more restrictive channeling approach."[5] The court instructed the Commission to create a more complete and thorough record to support channeling prescriptions.[6] In order to comply with the explicit mandate of the recent legislation, however, we must now abandon our plans to initiate a proceeding in response to the concerns raised by the court's decision.

4. The directive of the appropriations language affords us no discretion. It directs us to exercise our authority under the Communications Act to enforce the restrictions of Section 1464 of the Criminal Code on a twenty-four hour a day basis.[7] Consequently, in accordance with this legislative mandate and pursuant to our authority under Title 47, we will now enforce the indecency restrictions of Section 1464 twenty-four hours a day under our new rule. In enforcing this rule, the Commission will continue to apply its generic definition of indecency, which has been upheld by the courts.[8] Under this definition, broadcast indecency is language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.[9]

5. Pursuant to the Administrative Procedure Act, 5 U.S.C. § 553, the Commission finds good cause for promulgating the rule herein without prior public notice and comment. Section 553(b)(3)(B) provides that an agency may promulgate a rule without notice and comment "when the agency for good cause finds. . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B). Because the recently enacted appropriations legislation mandates implementation of a twenty-four hour indecency ban, the Commission's task in promulgating the rule is purely ministerial and leaves no room for discretion. No purpose would thus be served by affording the public an opportunity to comment on this rule before its promulgation.

PAPERWORK REDUCTION ACT STATEMENT

The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, and found to contain no new or modified form, information collection, and/or recordkeeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

6. Authority for the action taken herein is contained in Sections 4(i), 303(r), 312(a)(6), 312(b), and 503(b)[(1)](D) of the Communications Act of 1934, as amended, and Pub. L. No. 100-459 (signed October 1, 1988).

7. Accordingly, IT IS ORDERED that Part 73 of the Commission's Rules and Regulations is amended as described above and set forth in Appendix A below.

8. IT IS FURTHER ORDERED that pursuant to the Administrative Procedure Act, 5 U.S.C. Section 553(d)(1), the amendments to the Commission's Rules and Regulations shall become effective 30 days after publication in the *Federal Register*.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Chapter I, Title 47, Part 73 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 73 continues to read as follows: Authority: 47 U.S.C. §§ 154, 303, 312 and 503.

2. A new section 73.3999 is added to the Commission's Rules, which will read as follows:

Section 73.3999 Enforcement of 18 U.S.C. § 1464 (Restrictions on the transmission of obscene or indecent language)

The Commission will enforce the provisions of Section 1464 of the United States Criminal Code, 18 U.S.C. § 1464, on a twenty-four hour per day basis in accordance with Public Law No. 100-459.

FOOTNOTES

[1] *Making Appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies for the Fiscal Year Ending September 30, 1989, and for Other Purposes,* Pub. L. No. 100-459 (signed October 1, 1988).

[2] *See Pacifica Foundation,* 56 FCC 2d 94 (1975) (WBAI-FM), *aff'd, Pacifica Foundation,* 438 U.S. 726 (1978) *(Pacifica); Pacifica Foundation Inc.,* 2 FCC Rcd 2698 (1987), *The Regents of the University of California,* 2 FCC Rcd 2703 (1987), and *Infinity Broadcasting Corp. of Pa.,* 2 FCC Rcd 2705 (1987), order on *reconsideration, Infinity Broadcasting Corp.,* 3 FCC Rcd 930 (1987) *(Reconsideration Order), aff'd* in part and remanded in part *sub nom., Action for Children's Television v. FCC,* 852 F.2d 1332 (D.C. Cir. 1988) (ACT).

[3] *WBAI-FM,* 56 FCC 2d at 98.

[4] *Reconsideration Order,* 3 FCC Rcd at 937 n.47.

[5] *ACT,* 852 F.2d at 1334. The court affirmed a Commission ruling that a morning broadcast violated Section 1464.

[6] *Id.*

[7] The legislative history of H.R. 4782 also makes clear that Congress adopted the indecency amendment in order to eliminate any so-called safe harbor for the broadcast of indecent material. See 134 Cong. Rec. S9912 (daily ed. July 26, 1988) (remarks of Sen. Helms).

[8] *See* Pacifica, 438 U.S. at 726; ACT, 852 F.2d at 1334.

[9] *Reconsideration Order,* 3 FCC Rcd at 930.

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Enforcement of Prohibitions Against Broadcast Obscenity and Indecency in 18 U.S.C. Section 1464.

I concur in the result, but I write separately to recognize the constitutional question this decision raises. The majority correctly concludes "[t]he directive of the appropriations language affords us no discretion. . ." in this matter. Nevertheless, I have serious doubts whether our new rule will pass constitutional muster.

The Supreme Court in *Pacifica Foundation* upheld the Commission's finding that an indecent monologue broadcast in the early afternoon constituted cause for granting a complaint against the station which had broadcast the monologue. *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978). The Court however, emphasized that its ruling was narrow, and was based on "consideration of a host of variables. . ." *(id* at 750), of which the first mentioned was the time of day of the broadcast. *Id* at 750.

Recently the U.S. Court of Appeals for the District of Columbia struck down part of two Commission rulings regarding indecent broadcasts. The Court found that the Commission had not properly justified its choice of the hours midnight to 6 a.m. for the channeling of indecent speech. The Court directed the Commission to reopen its examination of the time limitation:

> . . . in a manner sensitive to these considerations: (1) the speech at issue. . . is protected by the first amendment; (2) the Commission's avowed objective is not to establish itself as a censor but to *assist parents* in controlling the material young children will hear." [emphasis in original] *Action for Children's Television v. F.C.C.,* 852 F. 2d 1332, 1334 (1988).

The Court held that:

> Broadcast material that is indecent but not obscene is protected by the first amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people say and hear. *Id.* at 1344.

Finally, the Court noted:

> Content-based restrictions ordinarily "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. v. Public Serv. Comm'n,* 447 U.S. 530, 540, 100 S.Ct. 2326, 2334, 65 L.Ed. 2d 319 (1980). . . Here, *the precision necessary to allow scope for the first amendment shielded freedom and choice of broadcasters and their audiences cannot be accomplished, we believe, unless the FCC adopts a reasonable safe harbor rule. Id.* at 1343, n. 18. [emphasis added]

Both these rulings suggest that the courts would not uphold an outright ban on the broadcast of indecent speech. In the face of those decisions, I have grave misgivings about the constitutionality of the appropriations language. Our mandate from Congress, however, is unambiguous, and therefore I must support the action taken in this *Order.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

LIABILITY OF RAYSTAY COMPANY
d/b/a TV CABLE OF CARLISLE
Carlisle, Pennsylvania

Application for Review

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 1988; Released: January 9, 1989

By the Commission:

1. The Commission has before it for consideration an Application for Review filed by Raystay Company d/b/a TV Cable of Carlisle (hereinafter Raystay) serving Carlisle, Pennsylvania and other communities. Raystay seeks review of a letter decision dated July 27, 1987, issued pursuant to delegated authority by the Engineer in Charge, Field Operations Bureau, Philadelphia, Pennsylvania. Therein, the Engineer in Charge denied Raystay's request for mitigation or cancellation of a $2,000 forfeiture issued to Raystay for its repeated violation of the Commission's signal leakage standard contained in former Section 76.605(a)(12) (now Section 76.605(a)(11)) of the Commission's Rules.[1] In his denial of mitigation, the Engineer in Charge concluded that Raystay had repeatedly violated the rule and had introduced no evidence which warranted mitigation or cancellation of the forfeiture imposed.

2. In its petition, Raystay does not dispute the fact that during two separate inspections of its cable system conducted on January 30-31, and September 9, 1986, Commission personnel found a total of twenty-five instances of excessive signal leakage varying in intensity from 56 uV/m to 398 uV/m.[2] Rather, Raystay maintains that despite these leaks, no forfeiture can be imposed because Section 76.605(a)(11) must be read in conjunction with Section 76.614, which requires a cable system operator using aeronautical frequencies, such as Raystay, to monitor its system for leakage quarterly.[3] Raystay asserts that since it performed the required quarterly monitoring and made associated repairs it cannot be held liable for the excessive signal leakage later found by the Commission. Furthermore, Raystay points out that all the instances of excessive signal leakage reported to it by the Commission were subsequently corrected. With regard to the five leaks found during the Commission's second inspection, Raystay maintains that although these leaks occurred at the same locations noted in the Commission's first inspection they were nevertheless new leaks. Raystay also objects to the Engineer in Charge's statement that it appeared that Raystay's cable system was either not being properly monitored for signal leakage or that leakage once found was not being properly repaired. Raystay maintains that the Engineer in Charge's finding lacks the requisite specificity required to support a forfeiture since it failed to set out how Raystay's monitoring or repair procedures were deficient. Thus, Raystay asserts that the forfeiture imposed should be rescinded because it was not given adequate notice of the standard it was expected to meet.

3. Section 76.605(a)(11) of the Commission's Rules prohibits a cable television system that uses frequencies between 54 MHz and 216 MHz, such as Raystay's, from exceeding a maximum signal leakage standard of 20 microvolts per meter measured at a distance of ten feet from its cable. Compliance with this standard is required to insure that cable television systems using these frequencies will not interfere with over-the-air users of the same frequencies in the same area. The Commission is particularly concerned with excessive signal leakage since such leakage has the potential to interfere with various safety-of-life services such as aeronautical, fire and police communications. Consequently, cable television system operators must maintain the integrity of their cable distribution plant.

4. Turning to Raystay's arguments in this matter, we find its contention that it was relieved of any forfeiture liability because it conducted quarterly leakage monitoring to be without any merit. A cable operator is clearly not relieved of its obligation to insure the integrity of its cable system at all times merely because it conducts quarterly inspections, just as the absence of excessive signal leakage would be no defense to a charge of failing to perform regular system monitoring. The monitoring standard of Section 76.614 and the signal leakage criteria of Section 76.605(a)(11) reflect separate, distinct obligations. These requirements are intended to function together to reduce the risk of destructive interference to vital aeronautical communications and navigation signals. Raystay's suggestion that we permit it to avoid one of its principal obligations in controlling such potentially dangerous interference on the grounds that it complied with a different, though similarly motivated, rule is neither reasonable nor acceptable. Furthermore, Raystay's objections to the Engineer in Charge's statement that it appeared that Raystay's system was not being properly monitored or repaired are irrelevant to the matter at issue. The forfeiture here is imposed specifically for the excessive leakage, not for the Engineer's additional description as to possible reasons for that leakage. With respect to Raystay's assertion that it corrected all the signal leakage brought to its attention by the Commission, we note that the Commission has long held that corrective action taken subsequent to notification of a violation will not relieve liability or avoid the forfeiture.[4] *Executive Broadcasting Corporation*, 3 FCC 2d 699 (1966). Moreover, basing mitigation or cancellation of a forfeiture upon corrective action taken subsequent to the misconduct upon which liability is based would tend to encourage remedial rather than preventive action. *International Broadcasting Corp.*, 19 FCC 2d 793, 794 (1969). Lastly, contrary to Raystay's contention that it was not provided with notice of the standard it was expected to meet, Section 76.605(a)(11) of our rules clearly sets forth the permissible signal leakage level cable operators are charged with maintaining on their system. Raystay was clearly cited by the Engineer in Charge in the Notice of Apparent Liability for repeatedly violating the leakage standard set out in this section of the Rules.

5. In view of the above, we find that a grant of Raystay's Application for Review is not in the public interest.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80(f) of the Commission's Rules, that Raystay Company d/b/a TV Cable of Carlisle forfeit two thousand dollars ($2,000) for repeated violations of former Section 76.605(a)(12) (now Section 76.605(a)(11)) of the Commission's Rules. Payment of the forfeiture may be made by mailing the Commission a check or similar instrument drawn to the order of the Federal Communications Commission. If this forfeiture is not paid within thirty (30) days of the release date of this Memorandum Opinion and Order, the case will be referred to Department of Justice for collection, pursuant to Section 504(a) of the Communications Act of 1934, as amended.

7. IT IS FURTHERED ORDERED, That a copy of this Order shall be sent Certified Mail - Return Receipt Requested to Raystay Cable d/b/a TV Cable of Carlisle.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The amount specified was the maximum permitted under the authority delegated to the Field Operations Bureau by Section 0.311(d)(1) of the Commission's Rules.

[2] Section 76.605(a)(11) of the Commission Rules prohibits cable television operators which use frequencies between 54 and 216 MHz, such as Raystay, from exceeding a maximum signal leakage standard of 20 microvolts per meter measured at ten feet.

[3] In its petition, Raystay states that although it monitors its system quarterly, it is not required to do so under Section 76.614 since it is not using aeronautical frequencies. However, the inspection reports, as well as Raystay's annual cable system reports (FCC Form 325, Schedule 2), reveal that Raystay uses various aeronautical frequencies.

[4] Raystay maintains that the five leaks found during the Commission's second inspection were new leaks. We need not address this issue since "repeated" merely means more than once. *Hall Broadcasting Corp.*, 79 FCC 2d 169, 171 (1980); *Friendly Broadcasting Co.* 45 FCC 2d 46 (1962). It is clear that Raystay's operation of its cable system on the relevant dates of inspection with excessive signal leakage constitutes a "repeated" violation of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 88-567

In the Matter of

Amendment of Part 90 of the Commission's Rules to Implement a Conditional Authorization Procedure for Proposed Private Land Mobile Radio Service Stations — RM 6277

NOTICE OF PROPOSED RULE MAKING

Adopted: December 12, 1988; Released: January 9, 1989

By the Commission:

I. INTRODUCTION

1. Before this Commission is a proposal submitted by the Special Industrial Radio Service Association, Inc. (SIRSA) on January 15, 1988, and a Petition for Rule Making filed by the National Association of Business and Educational Radio, Inc. (NABER) on February 9, 1988, hereinafter referred to as "petitioners," for implementation of a temporary authorization procedure for proposed Private Land Mobile stations operating below 800 MHz.[1] These proposals seek amendment of the provisions of Section 90.159 of the Commission's Rules, 47 C.F.R. § 90.159, in order to enable applicants for new stations to commence operations under a temporary permit upon completion of the frequency coordination process and submission of their applications to the Commission.[2] Also under consideration are comments filed by Motorola, Inc., and Forest Industries Telecommunications (FIT).[3]

II. BACKGROUND

2. Under our present procedure, applicants for new stations complete license applications for radio station authorizations on the standard Application Form 574. The applications and filing fees are sent to the certified coordinator for the particular radio service in which the applicant is eligible. The coordinators are then responsible for assuring that applications are properly completed and that the data items 1-25 on the applications are correct, as this information must be reviewed and considered during the course of the coordination process. The coordinators identify the frequency bands available for assignment and recommend the frequency that is least likely to affect adversely the operations of existing radio stations. The coordinators, on behalf of the applicants, file the applications and accompanying frequency coordination recommendations at the Commission's lock box bank facility in Pittsburgh, Pennsylvania.[4] Applicants are prohibited from commencing operation until we complete the application process and grant a license, a process that generally takes approximately 20 to 45 days.

3. Although applicants for new stations are currently prohibited from operating until a license is granted, "add-on" user applicants of our existing multiple licensed mobile relay stations may operate immediately in accordance with the provisions of Section 90.159 of our Rules.[5] Under this procedure, an applicant for a Business Radio Service station license utilizing an existing authorized facility is permitted to operate its radio station pursuant to a temporary permit for a period not to exceed 180 days. The temporary permit is evidenced by a properly executed certification acknowledging the temporary authorization and the mailing of a formal application and accompanying frequency coordination recommendation to the Commission.[6]

III. PETITIONERS' PROPOSALS

4. The petitioners assert that our adoption of this temporary licensing procedure for "add-on" users has been beneficial to both licensees and this Commission in that it results in an expeditious authorization without placing any additional burden on our licensing process. They contend that their temporary licensing proposal for new radio stations is a logical extension of our instant "add-on" procedure. To this end, they request amendment of Section 90.159 of the Rules to allow temporary licensing of new stations in the Private Land Mobile Radio Services.

5. To effectuate the proposed system, the petitioners suggest that we amend the rules and modify FCC Application Form 574 to reflect that the filing of a frequency coordination recommendation with a properly completed application will allow the applicant to operate under a temporary permit if certain conditions are met. They suggest that the application form be modified to include additional applicant certifications relating to these conditions.

6. In support of its proposal, SIRSA states that a temporary authorization procedure would directly benefit Special Industrial and Motion Picture Radio Service eligibles who now must, according to SIRSA, wait 30 to 45 days, on average, for operating authority once their applications have been filed with the Commission. By permitting applicants to activate their systems immediately upon the filing of their applications, SIRSA suggests that the Commission would be helping to speed the progress of industrial and commercial activities. SIRSA also states that consumers would benefit as well because service could be provided more expeditiously to the American public. Moreover, SIRSA maintains that our adoption of its proposal would provide an opportunity to assess whether the temporary licensing concept should be extended to similar applications in other private radio services.

7. SIRSA believes that, subject to certain constraints, the experimental temporary authorization program could be implemented for all Special Industrial and Motion Picture Radio Services applications below 800 MHz without adversely affecting interference levels. Specifically, SIRSA anticipates that the experimental licensing program would work as follows. First, an applicant would apply to SIRSA for frequency coordination. SIRSA would then examine the application, proof the entire Form 574 (Items 1 through 37), complete corrections when authorized to do so by the applicant, perform coordination, and recommend the most appropriate frequency.

8. Upon completion of frequency coordination, SIRSA would determine whether the applicant's proposed station qualifies for temporary operation. This determination would include an examination to ensure that (1) the proposed station is south of Line A; (2) the application does not request waiver of any provisions of the Commission's Rules and Regulations; (3) the transmitting antenna for the proposed station does not exceed 6.1 meters (20 feet) above ground or above an existing man-made structure, or, alternatively, the structure or tower has previously been cleared by the Federal Aviation Administration; and (4) the applicant appears to be eligible in the Part 90 radio service (Special Industrial or Motion Picture) under which application is being made.

9. Thereafter, SIRSA would prepare an Application Acknowledgment Letter and check the appropriate block to indicate whether the applicant qualifies for temporary operation of the proposed station. If temporary operation were appropriate, SIRSA would file the application with the Commission's lockbox bank facility in Pittsburgh, Pennsylvania, and attach to the top of the application package a copy of the Application Acknowledgment Letter. At the same time, SIRSA would forward the original of its Application Acknowledgement Letter to the applicant, along with a copy of the application filed with the Commission, and advise the applicant that it could begin temporary operation.

10. NABER also requests that the Commission amend Section 90.159 to permit temporary licensing for new radio stations in the Business Radio Service that meet certain criteria. Specifically, NABER requests that applicants for newly authorized Private Land Mobile Radio facilities be permitted to operate under a form of temporary licensing. According to this proposal, such temporary authorization would extend only to license applicants for systems on a Business Radio Service frequency after the applicant completed the Commission's license application, and after NABER reviewed the application and completed its frequency coordination recommendation. Temporary licensing would be permitted after frequency coordination for the submitted application was issued by NABER and the application, together with the coordination and the appropriate filing fee, was deposited in the mail to the Commission.

11. Given the additional review requirements and duties imposed on the frequency coordinators in PR Docket No. 83-737,[7] NABER believes that a preliminary review of the application by the Commission prior to temporary authorization is not necessary. Under NABER's proposal, the coordinator would notify the applicant that the application has been reviewed by the coordinator, that a frequency recommendation has been issued and that the application has been mailed to the Commission. NABER notes that it already utilizes such a notification procedure. NABER also states that such notice of temporary authorization to the license applicant would make it clear that no permanent license has been issued and that the Commission has the complete authority to deny the application or to assign a different frequency to the applicant. NABER maintains, in this regard, that such a notice must make it clear that the applicant who goes on the air prior to receiving permanent authorization does so with a full understanding that a permanent authorization for such frequency might not be issued. NABER further proposes that any temporary license issued be for a period of no more than one hundred eighty (180) days or until the Commission takes action on the application.

12. NABER maintains that the necessity for expanding temporary licensing for new systems is a result of the increased delays caused by implementation of the Commission's fee program and the Commission's limited budgetary resources. Specifically, NABER asserts that the initiation of the Commission's fee program has resulted in additional processing time for the Commission and the applicant, and that additional delays have resulted from the requirement that applications be filed in Pittsburgh, Pennsylvania before being forwarded to Gettysburg, Pennsylvania for processing.[8] NABER states that the temporary licensing procedures proposed by NABER would permit applicants for new facilities who have received frequency coordination and review of the license application by the recognized frequency coordinator to begin to use such frequencies without the current delay encountered by applicants.

13. NABER proposes that such a system of temporary authorization not be permitted in the following instances where additional technical or regulatory concerns are present: first, when a waiver of a rule is involved or requested by the applicant; second, when clearance is required from the Federal Aviation Administration for an antenna site; third, when a Line A or Line C coordination is involved; and fourth, when the coordinator notes that other problems such as potential interference or co-channel licensee disputes may result from the issuance of a temporary license.

14. We have received comments in support of the petitioners' proposals from Motorola, Inc.,[9] and Forest Industries Telecommunications (FIT).[10] Motorola believes that the proposed rule amendment would be beneficial to consumers as well as to equipment suppliers. It notes that this temporary license procedure would improve the Commission's speed of service to applicants for new stations and permit an applicant to order equipment as soon as a frequency recommendation is made.[11] FIT requests that this procedure be applied to the Forest Products Radio Service.

IV. DISCUSSION

15. We have carefully considered the petitioners' proposals. We tentatively conclude that a system of conditional authority for private land mobile applicants for frequencies below 470 MHz, whose applications raise no special or non-routine issues, would enhance our ability to provide effective and expeditious service to the public. A conditional licensing program, as described below, would also be consistent with the provisions of Section 331(a) of the Act, which encourage the Commission to improve spectrum efficiency of and reduce the regulatory burden on private land mobile licensees. Limiting this program, at least initially, to applications for shared frequencies below 470 MHz would prevent potential disruption to the operations of existing licensees that have been granted exclusivity in the higher bands. In addition, we could summarily withdraw an applicant's conditional authority if, for example, its station caused objectionable interference during this interim period. Moreover, conditional authority would only be in effect during the

processing period and we would grant unconditional authority only after finding that such grant would be in the public interest.

Legal Authority

16. We tentatively conclude that a conditional licensing procedure is permissible under the Communications Act. Section 301 of the Act requires that all persons using any apparatus for the transmission of signals by radio be licensed under the provisions of the Act. Section 309(a) requires the Commission to determine, "in the case of each application filed with it," whether the grant of such application will serve the public interest convenience and necessity.[12] In addition, Section 303(r) provides that the Commission may prescribe such restrictions and conditions as may be necessary to carry out the provisions of this Act.

17. We believe that the Act allows us to use our rule making authority to make generic public interest determinations regarding certain classes of applications. Thus, by rule, we can conditionally authorize operations by granting applications subject to the condition of final Commission review.[13]

18. We have, on a number of occasions, enacted rules that provide for conditional operation of a private radio station pending the final grant of the application. For example, in 1976, we amended our rules to permit applicants in the Citizens Band Radio Service to engage in temporary operation pending action on their applications.[14] We subsequently adopted a virtually identical procedure for ship stations in the Maritime Services.[15] In 1980, as noted previously, we completed a rule making proceeding authorizing a system of temporary, conditional licenses for "add on" user applications.[16] These precedents provide support for our statutory authority to establish reasonable classifications for applications, and to enact rules providing for conditionally granting such applications, where such procedures would advance significant public interest objectives. We also note that we have encountered no problems with these systems. We seek comment on our tentative legal conclusions.

Conditional Licensing Policies and Procedures

19. The SIRSA and NABER proposals provide a useful basis for expanding conditional licensing in the private land mobile service. Our proposal incorporates many but not all of their suggestions as well as additional features that should facilitate the efficient and effective implementation of this program. We invite comment on all aspects of our conditional licensing proposal, as set forth below.

20. Under current procedures, an applicant for authorization in the private land mobile radio service is required to fill out FCC Application Form 574. A properly completed Form 574 currently contains the applicant's certification that all statements made are correct and that the applicant is neither a foreign government nor a representative thereof. In addition, the applicant certifies that the proposed station will not have a significant effect upon the environment as defined in Section 1.1307 of the Rules, 47 C.F.R. § 1.1307.[17] Finally, the application requires the applicant to provide a description of the business activities that qualify it to operate in a particular radio service.

21. To implement our conditional licensing program, we propose to amend Section 90.159 of our Rules, as set forth in Appendix A, to provide that an applicant for a new private land mobile radio station below 470 MHz may operate the proposed station for up to 180 days[18] upon receiving notice that its properly completed formal application, accompanied by a frequency recommendation in accordance with Sections 90.175 and 90.176 of the Rules, 47 C.F.R. §§ 90.175, 90.176, has been filed with this Commission. The application must reflect that the following requirements have been satisfied:

(1) the proposed station is south of Line A or west of Line C;[19]

(2) the applicant is not requesting a waiver of our Rules;

(3) the proposed antenna or tower structure does not exceed 6.1 meters (20 feet) above ground level or above an existing man-made structure, if the antenna or tower has not been previously cleared by the Federal Aviation Administration;[20] and

(4) the applicant has determined that the proposed station will not significantly affect the environment as defined by Section 1.1307 of our Rules.

22. Thus, under our proposal, the applicant would be required to certify that the proposed station met each of the conditions listed above. We could provide for this certification by amending the Form 574 to include the additional statements, or we could provide an additional form to be completed only by applicants for private land mobile radio systems below 470 MHz which desire to use the conditional licensing provisions. Either way, the applicant would be responsible for indicating that it complies with these requirements and that it intends to operate pursuant to its conditional authorization. Additionally, we propose to include on the application form a warning expressly providing that conditional authority may be terminated at any time by the Commission. This warning would include a statement that the applicant assumes all risks in the event conditional authority is terminated or the application is subsequently dismissed or denied.[21]

23. If we adopt this conditional licensing program, then we will also need to implement a system of interim call signs for stations operating under conditional authority. The interim identification system specified in Section 2.302 of our Rules, 47 C.F.R. § 2.302, for add-on users of existing private multiple licensed mobile relays can be used to identify these interim operations. This rule section provides that the interim call sign for a station operating under a conditional temporary authorization shall be the alphabetic characters "WT" followed by the seven digits of the applicant's local telephone number. The use of a telephone number as part of a conditional call sign would facilitate identification if interference problems were to occur.

24. We envision this proposal as a self-certification program under which the applicant is responsible for certifying that its station is eligible for the conditional licensing program and for indicating that it intends to operate on a conditional basis. Once the applicant receives notice that it has received a frequency recommendation, and that its application has been filed with the Commission, it will be free to commence operations if it certifies that it meets

the relevant conditions. During this period, we intend that the applicant maintain a copy of the filed application with its station records as evidence that it has received valid conditional authority.

25. By this action, we are not proposing to expand the existing role or responsibilities of the frequency coordinators.[22] In accordance with current procedures, they would remain responsible for reviewing items 1-25 of the application Form 574 as necessary to their frequency coordination responsibilities.[23] The coordinator would perform the coordination process and recommend the most appropriate frequency. The coordinator would file the application with the fee on behalf of the applicant and notify the applicant that coordination had been made and that the application had been filed.[24] At this point, the applicant, based on its prior self-certification, could commence operations under the proposed conditional authorization provisions of Section 90.159 of the Rules.

26. In those instances where a grant of conditional authority is impermissible under the Commission's Rules, the coordinator would continue, as it does now, to file the coordination recommendation and application for the applicant. The applicant, however, could not place its proposed station in operation until the Commission reviewed and granted the application.

27. We believe this concept of conditional authority is in the public interest in that it would allow license applicants that have an immediate need for communications systems to commence operations upon filing their applications if their applications can be routinely granted because they raise no special issues. Such routine applications, which are virtually never challenged or denied, can be identified by using the applicant self-certification method under consideration in this proceeding. In this regard, we solicit public comment concerning the ultimate design and implementation of this conditional licensing procedure. Specifically, we request comments regarding whether this proposal is consistent with the public interest and whether there are any further restrictions or conditions, other than those discussed above, that should be imposed as part of such a procedure for new Private Land Mobile Radio stations operating below 470 MHz. We will also consider comments that address whether this process should be applied to operations above 470 MHz. Comments supporting operation above 470 MHz should be specific as to suggested procedures that should be implemented.

V. INITIAL REGULATORY FLEXIBILITY ANALYSIS

A. Reason for Action

28. The Commission is proposing to expand its temporary licensing procedures for "add-on" users of community repeaters to applicants for new Private Land Mobile Radio stations seeking authorizations below 470 MHz. The proposed rule change would encourage larger and more effective use of radio by allowing applicants to satisfy their communications needs by commencing operation immediately, under a conditional authorization, upon the filing with the Commission of a properly completed and coordinated application.

B. Legal Basis

29. This action is taken in accordance with Sections 4(i), 301, 303(r), 309 and 331(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 301, 303(r), 309 and 331(a).

C. Reporting, recordkeeping and other compliance requirements

30. With the exception of keeping a copy of the filed application with the station records, no new requirements will be imposed on licensees because of this action.

D. Federal rules which overlap, duplicate or conflict with this rule

31. None.

E. Description, potential impact, and number of small entities involved

32. Small businesses would be positively affected by this proposal because it would enable them to begin radio operations as soon as they file a properly completed application that is accompanied by a frequency recommendation without waiting for completion of the application process. The number of small entities that would be affected is unknown.

F. Any significant alternatives minimizing the impact on small entities and consistent with the stated objectives

33. There are no significant alternatives that minimize the impact on small entities and are consistent with the stated objectives. Moreover, any impact on these entities will be positive in nature.

G. Paperwork Reduction Act Statement

34. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980. Although this proposal requires modification of the application form, it contains no new information collection and/or recordkeeping, labeling, disclosure or record retention requirements, and will not increase burden hours imposed upon the public.

VI. PROCEDURAL MATTERS

35. For purposes of this non-restricted notice and comment Rule Making proceeding, members of the public are advised that ex parte presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a) of the Rules, 47 C.F.R. § 1.1206(a). The Sunshine Agenda period commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, ex parte or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. § 1.1203.

36. In general, an ex parte presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. § 1.1202(b). Any person who submits a written ex parte presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral ex parte presentation that presents data or arguments not already reflected in that person's previously filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each ex parte presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. 47 C.F.R. § 1.1206.

37. Authority for issuance of this Notice of Proposed Rule Making is contained in Sections 4(i), 301, 303(r), 309 and 331(a) of the Communications Act of 1934, as amended, §§ 47 U.S.C. 154(i), 301, 303(r), 309 and 331(a). Interest parties may file comments on or before **February 27, 1989,** and reply comments on or before **March 14, 1989.** The Commission will consider all relevant and timely comments before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that the fact of the Commission's reliance on such information is noted in the report and order.

38. In accordance with the provision of Section 1.419 of the Commission's Rules, 47 C.F.R. § 1.419, formal participants shall file an original and five copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy of their comments. All comments are given the same consideration, regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters at 1919 M Street, N.W., Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

47 C.F.R. Part 90 is proposed to be amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. 47 C.F.R. § 90.159 is proposed to be amended by changing its title and by designating the existing text of this rule section as paragraph (a) and adding new paragraphs (b), (c) and (d) to read as follows:

§ 90. 159 Conditional Temporary Authorizations

(a) * * *

(b) An applicant proposing to operate a new private land mobile radio station below 470 MHz that is required to submit a frequency recommendation pursuant to §§ 90.175(a)-(e) may operate the proposed station during the pendancy of its application for a period of up to 180 days under a conditional permit upon the filing of a properly completed formal application that complies with § 90.127 if the application is accompanied by a frequency recommendation in accordance with §§ 90.175 and 90.176, and provided that the following conditions are satisfied:

(1) The proposed station location is south of Line A or west of Line C as defined in § 90.7.

(2) The proposed antenna structure does not exceed 6.1 meters (20 feet) above ground level or above an existing man made structure (other than an antenna structure), unless the antenna structure has been cleared by the FAA as required by § 17.4(f).

(3) The grant of the application does not involve a waiver of the Commission's Rules.

(4) The applicant has determined that the proposed facility will not significantly affect the environment as defined in § 1.1307.

(c) The following applicants that are not required to submit evidence of frequency coordination under § 90.175(f) may operate the subject station during the pendancy of the application for a period not to exceed 180 days under a conditional permit upon the filing of a properly completed formal application that complies with § 90.127:

(i) An applicant proposing to operate on a frequency designated for itinerant operation only under § 90.175(f)(5).

(ii) An applicant seeking the assignment of authorization or transfer of control of a license for a station operating below 470 MHz that does not involve a change in the operating parameters of the existing station under § 90.175(f)(9).

(d) A conditional authorization pursuant to (b) and (c) above is evidenced by retaining a copy of the executed application and coordination recommendation, if re-

quired, with the station records. Conditional authorization does not prejudice any action the Commission may take on the subject application. Conditional authority is accepted with the express understanding that such authority may be modified or cancelled by the Commission at any time without hearing if, in the Commission's discretion, the need for such action arises. Consistent with § 90.175(d), the applicant assumes all risks associated with operation under conditional authority, the termination or modification of conditional authority, or the subsequent dismissal or denial of its application. The transmissions of stations operating pursuant to conditional authority shall be identified by a temporary call sign consisting of the prefix "WT" followed by the applicant's local seven digit business telephone number as provided in § 2.302.

* * * * *

FOOTNOTES

[1] SIRSA and NABER are trade organizations representing Special Industrial and Business Radio Services licensees, respectively. Although they have requested that this procedure apply to frequencies below 800 MHz, we are proposing to limit conditional authority to frequencies below 470 MHz where licenses are granted on a shared rather than exclusive basis. *See* para. 16 *infra*.

[2] SIRSA has requested that this procedure be initiated by the Bureau, pursuant to delegated authority, on an experimental basis. In view of the substantive nature of this proposal we decline to implement an experimental conditional licensing procedure for new stations prior to the opportunity for public notice and comment. We, therefore, will consider SIRSA'S request as a petition for rule making.

[3] FIT is the trade organization representing licensees in the Forest Products Radio Service.

[4] For a discussion of frequency coordination in the Private Land Mobile Radio Service, *see* Report and Order in PR Docket No. 83-737, 103 FCC 2d 1093 (1986); and Private Radio Bureau, Report to the Commission on Frequency Coordination in the Private Land Mobile Radio Services, PR Docket 88-548 (December 5, 1988) (available in the Commission's Public Reference Room).

[5] *See* Amendment of Parts 1, 2 and 90 of the Commission's Rules and Regulations to implement a system of temporary licensing for multiple licensed mobile relay systems operating in the Business Radio Service in the 450-470 MHz band, Report and Order, PR Docket No. 79-338, 81 FCC 2d 373 (1980).

[6] Our adoption of this temporary licensing procedure concept for "add-on" users was affirmed in an unpublished opinion by the United States Court of Appeals for the District of Columbia. The court concluded that "the Report and Order adopting rules and procedures to implement this [temporary licensing] scheme . . . does not conflict with any of the explicit requirements of the Communications Act." Telocator Network of America v. FCC, No. 80-2181 (D.C. Cir. August 14, 1980).

[7] *See* note 4 *supra*.

[8] The Commission's licensing fee program requires the application fee to be mailed to a lockbox bank facility in Pittsburgh, Pennsylvania. *See* Report and Order in General Docket 86-285, 2 FCC Rcd 947 (1987).

[9] Motorola, Inc., Comments, filed March 21, 1988.

[10] Letter from James H. Baker, Executive Vice President, Forest Industries Telecommunications, to Chief, Private Radio Bureau, March 8, 1988.

[11] Motorola also suggests that this procedure should not apply to applications involving interservice sharing in the 150-174 and 450-470 MHz bands because parties other than coordinators have no opportunity to oppose the sharing request. The interservice sharing provisions of the rules, however, only require frequency coordination recommendations from coordinators. These recommendations are not subject to public notice and comment. *See* 47 C.F.R. § 90.176.

[12] For some types of applications, the Commission must wait 30 days before granting the application. This requirement does not apply to the private land mobile radio services at issue here. *See* Section 309(b).

[13] *Cf.* U.S. v. Storer Broadcasting Co., 351 U.S. 192, 202, 203 (1956), in which the Supreme Court held that the procedural requirements of Section 309 of the Act "must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation." Thus, in Storer, the Court held that the Commission need not conduct an individual hearing, as seemingly required by Section 309, before denying a license that violated the rules. The court concluded that the individual hearing requirement of Section 309 did not preclude the use of our rule making authority in licensing matters.

[14] *See* General Rules and Regulations, Citizens Radio Service, 41 Fed. Reg. 15849 (1976).

[15] Amendment of Parts 1, 81 and 83 of the Commission's Rules to implement a system of temporary authorizations for ship stations in the Maritime Services, 70 FCC 2d 863 (1979).

[16] *See* note 5 *supra*.

[17] If the applicant's proposed facility may have a significant effect upon the environment, the Commission's Rules require the applicant to submit an Environmental Assessment in support of the application. 47 C.F.R. §§ 1.1308, 1.1311. Applications in which the applicant has not certified that the facility will not significantly affect the environment would not be subject to our conditional licensing procedure. Precluding such applications from this program is consistent with our recent Notice of Proposed Rule Making in Gen. Docket No. 88-387, 3 FCC Rcd 4991 (August 16, 1988), in which we proposed amending Section 1.1312 of the Rules, 47 C.F R. § 1.1312, to require consideration of environmental factors before an applicant constructs facilities where a construction permit is not required.

[18] Private land mobile stations are not subject to the 180 day limitation for the duration of temporary authority specified by Section 309(f) of the Act, 47 U.S.C. § 309(f). We tentatively conclude, however, that a maximum 180 day term for conditional authorization is a reasonable period of time to allow for final disposition of an application by this Commission. It is also the maximum term permissible under the temporary permit procedures for "add-on" users. *See* Section 90.159 of our Rules.

[19] Line A is an imaginary line within the United States approximately paralleling the Canadian border, north of which Commission coordination with Canadian authorities in the assignment of frequencies is generally required. Similarly, Line C is an imaginary line paralleling the Alaska and Canadian border, east of which requires Canadian coordination. 47 C.F.R. § 90.7.

[20] Proposed antenna structures that pose a possible hazard to air navigation require Federal Aviation Administration approval. 47 C.F.R. § 17.4(f).

[21] In this regard, the Commission's Rules expressly advise applicants that a frequency coordination recommendation is advisory in nature and is not an assurance that the Commission will grant a license for operation on that frequency. The pur-

chase of equipment or other expenditure of money, therefore, would not be a factor in our final disposition of an application. *See* 47 C.F.R. § 90.175(d). A grant of conditional authority would not create any right beyond the terms, conditions and periods of the authorization. 47 U.S.C. § 301.

[22] We note that the petitioner's proposals appear to contemplate some additional coordinator responsibilities. Our proposal involves no expansion of the role of frequency coordinators to effectuate conditional licensing.

[23] In reviewing the application for completeness, the coordinator is not exercising any decisional responsibility regarding the applicant's eligibility. The applicant's eligibility is based upon its representations on the application form, which the Commission presumes are truthful and accurate. *See* Sea Island Broadcasting, 60 FCC 2d 146 (1976); Nick J. Chaconas, 28 FCC 2d 231 (1971), *recon. denied*, 35 FCC 2d 698 (1972).

[24] As stated above, this conditional licensing procedure would apply to all applications for stations below 470 MHz that require a frequency coordination recommendation pursuant to 47 C.F.R. §§ 90.175(a) through (e). Although the applications listed in subsection (f) of this rule do not require such recommendation, they require coordination and approval by the National Telecommunications and Information Administration (NTIA) or Commission action before a conditional authorization could be allowed. We therefore would not include the applications listed in subsection (f) in the conditional licensing program with the following exceptions: (1) applications listed in subsection (f)(5) requesting a frequency for itinerant operation only; and (2) applications pursuant to subsection (f)(9) that pertain to assignment of authorization and transfer of control applications that do not involve a change in the operating parameters of the existing station. Such applications do not require frequency coordination. Thus, we propose to include the applications described in subsections (f)(5) and (f)(9) in the conditional licensing program. We solicit comments on this matter.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-212

In the Matter of

Amendment of Rules and Policies
Governing the Attachment of Cable
Television Hardware to Utility
Poles

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: December 22, 1988; Released: January 9, 1989

By the Commission:

I. INTRODUCTION

1. In our *Report and Order* [1] we amended our rules and policies governing the attachment of cable television (CATV) hardware to poles owned or controlled by telephone or electric utilities. On September 22, 1987, United States Telephone Association (USTA) filed a Petition for Reconsideration (Petition).

2. USTA requests reconsideration of a number of items addressed, including our conclusions regarding non-pole-related appurtenances, guys and anchors provided by the cable company, the definition of onerous contractual provisions, as well as the procedures that should be followed and the information that should be submitted by the parties in each pole attachment complaint proceeding. The Virginia Electric Power Company (VEPCO) and BellSouth Corporation (BellSouth) filed comments in support of the petition for reconsideration. The Cable Operators and Associations[2] and the National Cable Television Association, Inc. (NCTA) filed oppositions to the petition. For the reasons stated herein, we deny the Petition for Reconsideration but clarify certain portions of the *Report and Order*.

II. BACKGROUND

3. The cable television industry leases space on existing distribution poles owned by electric utilities and telephone companies to attach its coaxial cable and related equipment. In the Pole Attachment Act of 1978 (the Act), 47 U.S.C. § 224 (1982), Congress mandated that the Commission ensure that the rates, terms and conditions under which cable television operators attach their hardware to utility poles are just and reasonable in those state jurisdictions that have not elected to regulate such matters locally. Among other things, the Act establishes guidelines to determine the maximum and minimum levels at which rates can be considered just and reasonable. The Commission promulgated Sections 1.1401 through 1.1415 of its Rules to implement the Act. [3] However, in *Alabama Power Company v. FCC*, 773 F.2d 362 (1985) (*Alabama Power*), the United States Court of Appeals for the District of Columbia Circuit determined that the Commission's methodology did not result in the calculation of the maximum just and reasonable rate allowable under the Act.[4] In June 1986, we commenced a Rule Making proceeding to examine the questions raised by the court. In the *Report and Order*, we modified the method previously used to determine the operating expenses and capital costs of poles in order to arrive at a rate formula which will more accurately calculate a rate approaching the statutory maximum. We also modified the procedural rules to clarify the steps that should be taken and the information that should be submitted by the parties in each complaint proceeding.

III. CONTENTIONS OF THE PARTIES AND DISCUSSION

A. *Non - Pole - Related Appurtenances*

4. In our formula developed through the implementation of the Act,[5] we originally adjusted the utilities' net pole investment downward by fifteen percent to eliminate the investment in non-pole-related appurtenances (crossarms and other non-pole-related items). In the *Report and Order* we retained the fifteen percent figure as the presumptive deduction for non-pole-related appurtenances for electric utilities.[6] However, the record demonstrated that, unlike electric utilities, telephone companies generally attach cable and insulated wire directly to the pole rather than to crossarms, which constitute a significant portion of the appurtenances to be removed from the pole line account. Thus, it became evident that a typical telephone company's investment in non-pole-related appurtenances is considerably less than that of the electric utility. Therefore, we adopted an appurtenance ratio of five percent for telephone companies.[7] We stipulated that these ratios are rebuttable presumptions to be utilized in the event no party chooses to present probative, direct evidence on the actual investment in non-pole-related appurtenances.[8]

5. *Comments*. In its petition, USTA asserts that, if the Commission adopts an appurtenance ratio for telephone companies, it should not adopt a five percent ratio.[9] Recognizing that crossarms are used less by telephone companies than by electric companies, it states that, to the extent such items are still in use by telephone companies, they are being phased out. As a result, according to USTA, investment that was made for telephone crossarms in the past is likely to be no longer in the accounts from which the five percent deduction is being made.[10] Therefore, USTA states that the five percent exclusion would result in cable operators getting a gratuitous discount for nonexistent investment.[11]

6. Instead, USTA proposes that the Commission adopt a policy that there be no deduction for crossarm costs for telephone companies if they merely submit a declaration that they have an incidental presence of crossarms in the area involved.[12] It states that the five percent deduction presumption only should be reinstated if a cable operator could document the presence of more than incidental telephone crossarm investment that is still taken into account in developing the revenue requirement for the local exchange carrier in the area.[13]

7. BellSouth also opposes the five percent appurtenance ratio adopted for telephone companies, asserting that that figure is not supported by the record. Rather, it maintains

that the maximum rebuttable presumption should be set at one percent.[14] Neither USTA nor BellSouth provides studies or documentary evidence to support their claims in this regard.

8. In their Oppositions to USTA's petition, NCTA[15] and Cable Operators and Associations[16] state that the record supports a rebuttable presumption that the cost of a bare telephone pole should be adjusted by at least five percent to reflect the presence of non-pole-related appurtenances.

9. *Discussion*. We were persuaded by the record in this proceeding that telephone companies utilize fewer crossarms, which constitute the major portion of non-pole-related appurtenances, than electric utilities. In response to the Notice of Proposed Rule Making (NPRM) in this proceeding, we provided parties with the opportunity to present probative, direct evidence on the actual investment in non-pole-related appurtenances. However, as we recognized in the *Report and Order*, the record did not contain an extensive engineering analysis or probative, direct evidence as to which items should or should not be classified as non-pole-related appurtenances and the percentage of the pole line account attributable to these items.[17] Therefore, we adopted a reasonable compromise ratio of fifteen percent for electric utilities and reduced the appurtenance ratio for telephone companies from fifteen percent to five percent. These ratios were adopted as rebuttable presumptions. We cannot adopt USTA's proposal that we presume no deduction for crossarm costs if a telephone company merely submits a declaration of incidental crossarms and that we reinstate the five percent deduction presumption only if a cable operator can document the presence of more than incidental investment in these items. The utility maintains the records regarding its investments and is in the best position to provide information regarding non-pole-related appurtenances. In contrast, USTA's proposal would inappropriately require cable operators in the first instance to provide information regarding utility crossarm investment. Because the appurtenance ratios we adopted in the *Report and Order* are rebuttable presumptions, the utilities have ample opportunity to make the requisite evidentiary showing to assure that the cable companies will not be given a discount for nonexistent utility investment. Moreover, a zero percent appurtenance ratio is inappropriate because, although crossarms represent a significant percentage of the discount, the allowance also includes non-pole-related appurtenances other than crossarms. Therefore, we shall retain the appurtenance ratio exclusions adopted in the *Report and Order* as rebuttable presumptions.

B. *Guys and Anchors Provided by the Cable Company*

10. The court in *Alabama Power* determined that utility guys and anchors[18] benefit all pole users and thus cable operators should pay a proportionate share of these costs.[19] However, the court also raised the question whether an offset or credit should be made to the maximum pole attachment rate when the cable company supplies its own guys and anchors.[20] In the *Report and Order* we concluded that, if a cable company is able to present evidence that cable company-provided guys and anchors benefit either the utility or other pole users, it is entitled to a credit or offset for its investment in these items.[21]

11. *Comments*. USTA maintains that an offset or credit should not be allowed for guys or anchors provided by the cable company when it attaches its facilities to utility property unless these items have been specifically contemplated in the negotiation of the attachment agreement. USTA argues that only in that situation would the parties have some understanding about whether that activity by cable operators was acceptable to the owner of the pole and the extent to which these private attachments would be permitted.[22] It asserts that the utility as the owner of its poles, must retain the attributes of ownership, and that one of the rights of ownership is the authority to decide whether or not to accommodate or permit the attachment of another entity's guys and anchors to its poles. It states that the pole owner has the right to determine whether such anchors or guys provide some benefit that it is willing to accept in lieu of installing its own.[23] USTA further states that a Commission requirement that a cable operator be compensated for anchors or guys it installs on the property of another, without clear prior understanding and consent by the pole owner, is unreasonable and inconsistent with basic principles of contract law and property law. It concludes that such a policy effectively sets a standard of compulsory payment through credit or offset for gratuitous enhancements that may not have been desired.[24]

12. Thus, USTA proposes a different standard concerning guys and anchors which would limit the availability of a credit or offset to circumstances where (1) there is a prior agreement by a utility to accept guys and anchors from the cable operator; (2) these attachments benefit the utility who is the party to the pole attachment agreement; and (3) the guys and anchors provided by the cable operator actually reduce the utility's own installation of guys and anchors. It states that only if all of these conditions are met should an offset or credit be available.[25]

13. VEPCO supports USTA's petition and argues that credits or offsets for guys and anchors supplied by cable systems potentially encourage situations wherein the installation of guys and anchors by cable operators confer no benefit on the utility except to stabilize poles that would not have required additional stabilizing "but for" the cable attachments.[26] VEPCO asserts that the Commission should amend the terms in its *Report and Order* to ensure that cable operators cannot seek credits or offsets for guys and anchors through the complaint process unless the cable operators negotiate acceptance of the guy or anchor attachment prior to installation, and the cable operator can demonstrate that the pole-owning utility, not simply any other pole user, will benefit by guy or anchor installation.[27]

14. NCTA, on the other hand, supports the procedure adopted in the *Report and Order* for crediting cable systems for the costs incurred when a cable system installs guys and anchors.[28] NCTA opposes USTA's position that, even if the cable operator is able to demonstrate with probative evidence that its guys and anchors benefit the utility, the cable operator should not be entitled to a credit or offset unless there is a prior agreement by a pole owner to accept guys and anchors installed by the cable operator. NCTA states that if the cable operator is able to show that its guys and anchors benefit the utility, then the enhancement to the pole can hardly be said to be gratuitous. However, if a cable operator cannot make the showing, the utility should bear none of the costs of the guys and anchors. NCTA concludes that the fact that a utility has not agreed in advance to accept such appurtenances cannot be the basis upon which to deny the cable operator a credit for guys and anchors that are shown to benefit the utility.[29]

15. Cable Operators and Associations assert that, contrary to USTA's contentions, guys and anchors provided by the cable company are not gratuitous but are required by the utilities' contracts and field instructions. It maintains that whether the guys benefit the utilities is a question of fact which cable operators should be permitted to prove.[30]

16. *Discussion.* We affirm that a cable company should be allowed to present evidence that it is entitled to a credit or offset for the guys and anchors which it provides when it attaches its facilities to poles. However, the comments of USTA have focused our attention on the need to clarify the circumstances in which such a credit or offset should be allowed. We agree with USTA that it may be inappropriate to allow the credit or offset if there is no prior understanding that the cable company will install guys and anchors. This understanding could be either under the pole attachment agreement, through field instructions, or under standard engineering guidelines that guys or anchors should be installed. Therefore, we conclude that the availability of the credit or offset should be limited to those instances when the cable company provides guys and anchors pursuant to its obligations in the pole attachment agreement or to prior understanding of the parties, to field instructions or under standard engineering instructions that guys or anchors are required, and the cable company is able to present evidence that these items benefit the utility or other pole users. The utility will, of course, have the opportunity to present independent evidence in opposition to a request for the credit or offset.

C. *Onerous Contractual Provisions*

17. In adopting a rate formula that will set rates approaching the statutory maximum, we determined that our adjustment to that rate within the zone of reasonableness or a revision of an unlawful term or condition may be appropriate in those cases where a cable operator is a party to a pole attachment agreement with onerous contractual provisions.[31]

18. *Comments.* USTA argues that the Commission, by granting relief from what it determines are onerous provisions, is interfering with the arm's length bargaining of parties who are already constrained by statutory limits. It states that the Commission's remedy places the Commission in an inherently biased position, posed to "remake the agreement" more in line with cable operator demands if it determines that a particular provision is onerous.[32] USTA asserts that the relief chosen by the Commission is typically available only for a contract deemed "unconscionable." It states that the legal standard for addressing and remedying contracts containing arguably "unconscionable" terms requires a burden of proof far higher than that suggested by the Commission in its *Report and Order*.[33]

19. USTA asserts that utilities no longer maintain a superior bargaining position in negotiating the rates, terms and conditions for pole agreements. It states that cable television is no longer fully dependent on poles or conduit, and is free, under the Cable Communications Act of 1984, to choose equally advantageous distribution alternatives.[34] It argues that nowhere in the *Report and Order* does the Commission indicate a willingness to entertain relief for pole owners which may be subject to onerous terms or conditions.[35] Moreover, USTA asks that the Commission confirm, for example, that there are situations where cable operators may be charged one-time costs in aid of construction.[36]

20. USTA also argues that the Commission must identify the universe of provisions it believes are onerous. It states that a case-by-case determination of onerous provisions will result in unreasonable discrimination and inconsistency. It further states that the Commission should allow input from all interested parties in determining whether a term or condition is onerous.[37]

21. VEPCO also objects to the Commission's decision to allow a cable operator to present evidence that-specific provisions of a contract to which it is a party are onerous and, therefore, entitle it to compensation or reimbursement. It states that interference by the Commission when a cable operator allegedly faces onerous contract provisions unfairly favors cable operators without regard to the circumstances and further skews the position of negotiating parties already operating within strict limits set by the Pole Attachment Act.[38]

22. NCTA objects to USTA's position that the Commission should only intervene where it finds pole attachment contract provisions "unconscionable." NCTA argues that the Commission, by ordering adjustments where a contract includes onerous terms and conditions, is consistent with the Pole Attachments Act which directs the Commission to ensure that terms and conditions are just and reasonable.[39] It states that, under this standard, the Commission has ample authority to reform or remedy onerous terms and conditions, even if they may fall short of what USTA would deem unconscionable. NCTA also rejects USTA's complaints that the Commission has not identified with specificity the sort of contract terms and conditions that may be sufficiently onerous to warrant a deduction in the pole attachment rental rate or other adjustment, and that a case-by-case determination will result in unreasonable discrimination and inconsistency. To the contrary, NCTA asserts that the utilization of a case-by-case approach is a well-established procedure in administrative law in which an agency establishes precedents by adjudicating controversies between individual parties.[40] It believes it is particularly appropriate in resolving complaints under the Pole Attachment Act because it is impossible to identify in advance the numerous ways in which utilities conceivably could use their monopoly control to extract unfair concessions from cable operators.[41]

23. Cable Operators and Associations assert that USTA is wrong in its premise that cable operators have cost-effective alternatives to the use of existing utility poles. They state that public utilities continue to hold monopoly control over essential poles. Cable Operators and Associations maintain that this is evidenced by the allegedly abusive terms and conditions imposed upon cable operators by the utilities.[42] They further argue that, in determining whether terms or conditions are onerous, there is no need to replace the Congressional standard of "just and reasonable" with a Uniform Commercial Code standard of "unconscionable," as proposed by USTA.[43] They state that there is no need to catalog, in advance by Rule Making, which terms and conditions utilities may or may not apply.[44]

24. *Discussion.* We disagree with USTA that by granting relief from onerous provisions, the Commission is interfering with the arm's length bargaining of parties who are already constrained by statutory limits. As we stated in the

Report and Order, in enacting Section 224 of the Act, Congress was aware that utilities conferred subordinate rights on cable operators in relation to the latter's use of pole space.[45] We also recognized that, even with regulation of the utilities' pole attachment rates, utilities still maintain a superior bargaining position over CATV systems in negotiating the rates, terms and conditions for pole agreements and scheduling make-ready work for the attachment of cable facilities.[46] On the other hand, as NCTA asserts,[47] it is difficult to create a realistic scenario wherein utilities, given their superior bargaining position, would be subject to provisions that are onerous, unjust or unreasonable. Nonetheless, we would, of course, examine the evidence if such a condition were presented to us and, in the event the burden of proof was met by the utility, we would make an appropriate finding or rate adjustment.

25. We also disagree with USTA's position that we should only find terms unlawful if they are "unconscionable." There is nothing in the Act or the legislative history which would define "just and reasonable" in this limited a fashion. USTA's assertion that the Commission's interference with a contract places the Commission in an inherently biased position is also misplaced. The Pole Attachment Act directs the Commission to ensure that terms and conditions are just and reasonable[48] and, in so doing, it is our duty to consider not only the interests of the cable system, but those of the utility as well. If a term or condition of a pole attachment agreement is found to be unjust or unreasonable, it is unlawful. Thus, under the "just and reasonable" standard, we have ample authority to consider terms and conditions in our ultimate decision on a complaint. In any event, we anticipate that the parties will have ample opportunity to defend against charges of allegedly onerous provisions.

26. It is not only difficult, but also might well be impossible, to identify in advance all specific types of contract terms and conditions that are unjust or unreasonable since that determination cannot be made in isolation of its factual scenario. Each pole attachment agreement has its own set of cost data, engineering requirements and terms and conditions, the interrelationship of which determines whether a particular term or condition within that agreement is onerous. A term or condition which could be found onerous when taken in the context of one particular agreement may be determined to be just and reasonable when examined in the context of another pole attachment agreement. We agree with NCTA that the case-by-case approach will not, as suggested by USTA, result in unreasonable discrimination and inconsistency, but is the approach by which an agency establishes precedents by adjudicating controversies between individual parties. It will also provide us flexibility to evaluate the impact of the alleged onerous provision within the context of the total agreement. Of course, we are directed by the Administrative Procedures Act, 5 U.S.C. § 552, *et seq.*, to decide similar cases in consistent ways unless we identify adequate reasons distinguishing similar cases. Judging terms and conditions in an adjudicatory proceeding does not alter that obligation. Therefore, we affirm our conclusion that, where onerous terms or conditions are found to exist on the basis of the evidence, a cable company may be entitled to a rate adjustment or the term or condition may be invalidated.

D. *Procedure - Associations As Complainants*

27. *Comments.* In the *Report and Order* we expanded the definitions of "complaint" and "complainant" to provide that a complaint could be filed by a cable television association or an association of utilities.[49] While USTA states that it does not seek reconsideration of this issue, it requests that the Commission address a number of related procedural points.[50] First, it states that the Commission should confirm the fact that, at all times, the real parties in interest (the individual cable operators) must be the parties to submit firsthand factual information in support of a complaint. It asserts that it would be entirely improper to have secondhand hearsay evidence originate from an association and become a basis for Commission action. USTA also states that an association, once it initiates a complaint, must remain as the active "prosecutor" of the complaint from the initial filing through to its completion. It believes that to initiate a complaint and then to withdraw from the process would undermine the integrity of that process and the common assumptions of parties to these proceedings. Lastly, it believes that similarly situated cable operators should be bound by the Commission's eventual resolution of a complaint to the extent that the facts apply to these other cable operators. It asserts that this principle is identical to that used in class action suits and the collateral estoppel doctrine.[51] VEPCO supports the changes proposed by USTA.[52]

28. NCTA states that the basis for USTA's need for assurance that associations filing complaints will remain as prosecutors for the duration of a proceeding is unclear and that, in any event, existing Commission Rules are adequate to deal with this situation.[53] NCTA also objects to USTA's assertion that cable systems that are not parties to an association-brought complaint but are situated similarly to cable systems that are parties should be bound by the resolution of the complaint. It asserts that there are no legal principles by which entities not parties to administrative complaint proceedings may be bound by the resolution of those proceedings.[54] NCTA states that USTA would have complaint decisions unjustifiably applied to cable systems that do not join in complaints and, as a result, are not real parties in interest.

29. *Discussion.* We agree with USTA's assertion that associations filing complaints should remain as prosecutors for the duration of a proceeding. We have always anticipated that, by allowing associations to file complaints, they would continue to prosecute a complaint throughout the proceeding. Indeed, failure of a complainant to prosecute is a ground for dismissal. In addition, we agree that firsthand factual information provided by individual cable operators would have greater probative value and would allow us to process more expeditiously the complaint and make a determination as to the reasonableness of rates, terms and conditions. However, we disagree with USTA's contention that similarly situated cable operators should be bound by the Commission's eventual resolution of a complaint, to the extent that the facts apply to these other cable operators. Although precedents certainly will be established by the adjudication of controversies between individual parties, only those real parties in interest identified in an individual complaint would be bound by *res judicata*.[55] Therefore, we shall retain, without modification, but with this further explanation, the provisions of Subsections 1.1402(d) and (e) which were adopted in the *Report and Order*.

E. *Procedure - Rate of Return Submission*

30. Our Rules require that the complaint include the rate-of-return authorized for the utility for intrastate service in the jurisdiction in which the cable company obtains pole attachment services. 47 C.F.R. § 1.1404(g)(10). In the *Report and Order* we decided to continue to utilize the most recent authorized intrastate rate-of-return as the cost of capital figure in our computation of pole attachment rates. We also modified the information that should be submitted by the parties in each complaint proceeding to require a utility to supply a copy of the state administrative or court decision establishing the most recent rate-of-return in its response to the complaint if the rate-of-return is at issue in the proceeding.[56]

31. *Comments*. USTA requests that the Rules be revised to allow utilities, as an alternative, to provide the most recent rate-of-return by reference to a document already submitted to the Commission in connection with the biannual rate-of-return prescription proceedings in CC Docket No. 84-800 and required by Section 65.200(a) of the Commission's Rules.[57]

32. NCTA objects to USTA's proposed alternative. It asserts that the Commission needs to be assured that documentation filed by the parties is definitively reliable. It states that the Commission-adopted procedure is more reliable and not burdensome.[58]

33. *Discusssion*. We decline to adopt USTA's proposed alternative that a utility be allowed to refer to a document which contains its most recent state-authorized rate-of-return if that document has already been submitted to the Commission in connection with the biannual rate-of-return prescription proceeding in CC Docket No. 84-800[59] and pursuant to Section 65.200 of the Commission's Rules. As we stated in the *Report and Order*, we are concerned that we have the most recent information available.[60] In addition, the Rules now require that the utility inform the Commission whether the decision is final or subject to any further proceedings either before the state regulatory body or in a court.[61] It is unlikely that documents filed in other proceedings will contain this information. We do not find the requirements of Section 1.1404(g)(10) to be burdensome and, therefore, affirm the adoption of this provision.

F. *Procedure - Summary of Negotiations*

34. Section 1.1404(i), 47 C.F.R. § 1.1404(i), previously provided that the complaint shall include a brief summary of all steps taken to resolve the dispute prior to filing. In the *Report and Order*, we reaffirmed our belief that it is in the interest of both the utility and the cable company to resolve disputes without resorting to filing a complaint before the Commission.[62] However, we amended Section 1.1404(i) in order to permit the complainant to explain that negotiations did not take place because they appeared to be useless under the circumstances and why it believes such steps were fruitless.[63]

35. *Comments*. USTA asserts that our amendment would effectively relieve the cable operator of any obligation to try to resolve the dispute between the parties without resort to the Commission. It states that parties merely will develop a standard boilerplate complaint recital about the claimed uselessness of negotiations. It maintains that complaints will be filed with the Commission without prior serious negotiations once a cable operator decides that filing a complaint directly will give it more bargaining leverage.[64]

36. USTA also objects to our statement in the *Report and Order* that if the utility wants to begin negotiations, it simply has to offer to negotiate since it is on notice that a cable company may be contemplating filing a rate complaint when the utility receives an information request from a cable company prior to filing a complaint pursuant to Section 1.1404(g) of the Rules.[65] USTA argues that utilities, in many cases, may not have had the opportunity to offer to negotiate since some utilities may not even know that a cable operator disputes the rates, terms and conditions until it is served with a complaint by a cable operator claiming "uselessness."[66] USTA proposes that to correct this problem, the Commission should include one additional provision to its new Section 1.1404(i). It states that in order to justify the filing of a complaint on grounds of the apparent uselessness of negotiations, a cable operator should be required to send a letter by certified or registered mail to the head of the local business office of the utility, requesting a pole attachment agreement or the opportunity to negotiate an agreement. It states that a reasonable period of time, such as 45 days, should be allowed for a response and that a copy of the letter should accompany the complaint to substantiate the cable operator's claim of apparent uselessness. [67]

37. BellSouth also opposes our amendment and states that the recitation that negotiations were considered useless will become standard boilerplate language in complaint proceedings. It asserts that, as a result, the Commission will receive many more complaints than would be filed if genuine negotiations remain a prerequisite to filing a complaint.[68]

38. NCTA disagrees with USTA's notification proposal. It states that once it appears that negotiations would be useless and would not lead to an agreement, there is no justification for forcing a procedure that will only delay the resolution of complaints brought pursuant to the Commission's procedures.[69] NCTA asserts that, even if the utility begins negotiations, it does not follow that negotiations will not be useless.[70]

39. *Discussion*. We require parties to negotiate in good faith the terms, conditions and rates of pole attachment contracts prior to filing a complaint to us. While we concur with the thrust of USTA's concern, we must reject USTA's proposed remedy. As the *Report and Order* states, it is in the interest of both the utility and the cable company to resolve disputes without resorting to filing a complaint before the Commission. Therefore, it is clear that parties should not file complaints with us without engaging, or attempting in good faith to engage, in serious private negotiating initiatives. To alleviate some of the concerns of USTA and BellSouth, it would be useful to clarify what we mean by useless negotiations. In the vast majority of circumstances we expect at a minimum that a cable company approach the utility with a specific request either to enter into or to review a contract. If the utility fails to respond within a reasonable time to that request or agree to begin to negotiate only under unreasonable terms (*e.g.* the utility is only willing to begin negotiations in six months), we would be inclined to conclude that negotiations would be useless under the circumstances. In addition, a cable company may be able to adequately explain that it is not able to enter into negotiations because a utility's past actions lead it to believe that attempting to negotiate would be useless.[71] We will closely scrutinize claims that negotiations would be useless. We have said in the *Report and Order* that failure to negotiate

in good faith may lead to Commission-imposed sanctions.[72] Such sanctions could include dismissal of the complaint or requiring negotiations under Commission auspices. In sum, we conclude that this clarification adequately addresses USTA's concerns.

IV. OTHER MATTERS

40. It has come to our attention that there were references in Appendix B of the *Report and Order* which were inconsistent with the FCC Annual Report Form M[73] and the FERC Form No. 1.[74] Therefore, we have corrected the references to these items and clarified references to other items in these forms for use in the Commission-adopted formulas.[75]

V. CONCLUSION AND ORDERING CLAUSES

41. Therefore, after full reconsideration of the conclusions in the *Report and Order*, we deny USTA's Petition.

42. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by the United States Telephone Association IS DENIED.

43. IT IS FURTHER ORDERED that, pursuant to Section 4(i), 4(j), 201-205, 218, 220, 403 and 404 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 201-205, 218, 220, 403 and 404, the clarifications and modifications of the policies and requirements set forth herein ARE ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, CC Docket No. 86-212, 2 FCC Rcd 4387 (1987).

[2] The comments of Cable Operators and Associations represent comments of both cable companies and cable associations. The group includes Texas Cable T.V. Association, Georgia Cable Television Association, Virginia Cable Television Association, Cable Television Association of Maryland, Delaware and the District of Columbia, Inc., American Cablesystems Corporation, Daniel & Associates, Inc., Harron Communications Corporation, Rogers Cablesystems, Inc., Telecable Corporation, United Cable Television Corporation, and United Artists Cablesystems.

[3] *See* Adoption of Rules for the Regulation of Cable Television Pole Attachments, CC Docket 78-144, *First Report and Order*, 68 FCC 2d 1585 (1978), *Second Report and Order*, 72 FCC 2d 59 (1979), *Memorandum Opinion and Order*, 77 FCC 2d 187 (1980), *aff'd*, Monongahela Power Co. v. FCC, 655 F.2d 1254 (D.C. Cir. 1981).

[4] In a Public Notice dated October 21, 1985 (Mimeo No. 0399), we announced that we would hold pole attachment matters in abeyance until further notice. On January 12, 1988, we released a Public Notice (DA 87-1924), establishing a pleading schedule for amending or updating pending pole attachment complaints and announced that, effective with the release of the notice, we will begin to process pole attachment complaints.

[5] *See* n.3, *supra*.

[6] 2 FCC Rcd at 4390.

[7] *Id.*

[8] *Id.*

[9] USTA Petition at 3.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 4.

[13] *Id.*

[14] BellSouth Comments at 2.

[15] NCTA Opposition at 3-5.

[16] Cable Operators and Associations Opposition at 3.

[17] 2 FCC Rcd at 4390.

[18] Guys are wires attached to the pole to support it. Anchors fasten the guys to the ground or other support.

[19] *See* Alabama Power Company v. FCC, 773 F.2d at 377.

[20] *Id.* at n.14.

[21] *Id.*

[22] USTA Petition at 4-5.

[23] *Id.* at 5.

[24] *Id.*

[25] *Id.* at 5-6.

[26] VEPCO Comments at 2.

[27] *Id.*

[28] NCTA Opposition at 5.

[29] *Id.* at 6-7.

[30] Cable Operators and Associations Opposition at 3.

[31] 2 FCC Rcd 4397.

[32] USTA Petition at 7.

[33] *Id.* at 7.

[34] *Id.* at 6-7.

[35] *Id.* at 7.

[36] *Id.* at 8.

[37] *Id.* at 8-9.

[38] VEPCO Comments at 2.

[39] NCTA Opposition at 8.

[40] *Id.* at 9.

[41] *Id.*

[42] Cable Operators and Associations Opposition at 1.

[43] *Id.* at 2.

[44] *Id.*

[45] 2 FCC Rcd 4387, 4397.

[46] *Id.*

[47] NCTA Opposition at 8.

[48] 47 U.S.C. § 224 (1984).

[49] 2 FCC Rcd at 4397.

[50] USTA Petition at 10.

[51] *Id.*

[52] VEPCO Comments at 3-4.

[53] NCTA Opposition at 10.

[54] *Id.* at 11.

[55] 2 FCC Rcd at 4398.

[56] *Id.*

[57] USTA Petition at 11.

[58] NCTA Opposition at 11-12.

[59] This proceeding has been reversed and remanded by the U.S. Court of Appeals for the District of Columbia Circuit. American Telephone and Telegraph Company v. FCC, No. 85-1778 (D.C. Cir. January 22, 1988).

[60] 2 FCC Rcd at 4398.

[61] *Id.*

[62] 2 FCC Rcd at 4399.

[63] *Id.*

[64] USTA Petition at 11-12.

[65] *Id.*

[66] *Id.* at 12.

[67] *Id.* at 13.

[68] BellSouth Comments at 2.

[69] NCTA Opposition at 13.

[70] *Id.* at 12-13.

[71] Our experience in adjudicating pole attachment complaints and monitoring negotiations between the parties has revealed that, although most utilities engage in good-faith negotiations, there is an occasional utility which is recalcitrant when attempts are made by the cable companies to negotiate a pole attachment rate consistent with our rules and policies.

[72] 2 FCC Rcd at 4407.

[73] *See* Letter from G. Michael Crumling, Director-Regulatory Affairs, US West, to Howard Wilchins, Deputy Chief, Enforcement Division, Common Carrier Bureau (September 23, 1987).

[74] *See* Letter from Deborah S. Colby, Esq., to Lenworth Smith, Common Carrier Bureau (November 24, 1987).

[75] A modified list of account references for FCC Annual Report Form M and FERC Form No. 1 is included in Appendix A attached hereto.

APPENDIX A

Account No.	Name	Location
FERC 364	Pole, Towers & Fixtures	p. 207 line 59, col. g
FERC 365	Overhead Conductors	p. 207, line 60, col. g
FERC 369	Services	p. 207, line 64, col. g
FERC 593	Maintenance of Overhead Lines	p. 322, line 118, col. b
FERC 408.1	Taxes Other Than Income Taxes	p. 114, line 11, col. c
FERC 409.1	Income Taxes - Federal	p. 114, line 12, col. c
FERC 409.1	Income Taxes - Other	p. 114, line 13, col. c
FERC 410.1	Deferred Income Taxes	p. 114, line 14, col. c
FERC 411.1	Deferred Income Taxes (credit)	p. 114, line 15, col. c
FERC 411.4	Investment Tax Credit Adj.	p. 114, line 16, col. c
	Depreciation	p. 200, line 22, col. c
	Total Administrative and General Expenses	p. 323, line 167, col. b
	Gross Plant Investment	p. 200, col. b
	Depreciation Rate for Accounts 364, 365 and 369	p. 336, col. c
	Investment in Accounts 364, 365 and 369	p. 203, lines 59 & 60 & 64, col. g
FCC FORM M 100.1	Telephone Plant in Service	p. 12, line 1, col. c
FCC FORM M 171	Depreciation Reserve	p. 12, line 7, col. c
FCC FORM M 176.1	Deferred Income Taxes (Accum.)	p. 13, line 83, col. c
FCC FORM M 241	Pole Lines Investment	p. 19, Sch 12A, col. h
FCC FORM M 304	Investment Credits	p. 16, line 5, col. b
FCC FORM M 306	Federal Income Taxes, Operating	p. 16, line 6, col. b
FCC FORM M 307	Other Operating Taxes	p. 16, line 7, col. b
FCC FORM M 308.1	Operating Federal Income Taxes Deferred - Accelerated Tax Depreciation	p. 16, line 8, col. b
FCC FORM M 308.2	Operating Federal Income Taxes Deferred - Other	p. 16, line 9, col. b
FCC FORM M 309	Income Credits and Charges Resulting from Prior Deferral of Federal Income Taxes	p. 16, line 10, col. b
FCC FORM M 608	Depreciation Rate for Account 241	p. 32, Sch. 14C, col. f
FCC FORM M 601.1	Repair for Pole Lines	p. 56, Sch. 35, Oper. Exp., line 1
	Depreciation Reserve for Account 241	p. 29, Sch. 14A, col. j
	Gross Plant Investment	p. 12, Sch. 10, line 1, col. c
	Total Administrative and General Expenses (General Office Salaries and Expenses-Total & Other Operating Expenses-Total)	p. 57

Before the
Federal Communications Commission
Washington, D.C. 20554

CORRECTED

In re:

CONNECTICUT CABLE TELEVISION ASSOCIATION, INC. — CSR-2684

Petition for Special Relief

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 1988; Released: January 3, 1989

By the Commission:

INTRODUCTION

1. On December 31, 1986, the Connecticut Cable Television Association, Inc. (hereinafter "CCTA"), an association whose members include, by its own description, twenty-five cable television companies serving nearly the entire State of Connecticut and approximately 95% of the State's cable subscribers, refiled its petition for special relief, seeking a ruling that Connecticut's 9% gross earnings tax on cable television systems is in conflict with federal law. CCTA's petition is opposed by the State of Connecticut and its Commissioner of Revenue Services (hereinafter "the State" or "Connecticut"), through the State's Attorney General, and CCTA has replied.[1]

2. Since 1965, Connecticut has imposed a gross earnings tax on cable television companies operating within the State. Cable companies are taxed by the State at 9%, but are exempted from state property taxes. Connecticut regulates cable television through the State's Department of Public Utility Control (hereinafter "DPUC") as a public service company, awarding, overseeing, and enforcing franchise agreements.[2] Several years ago (neither petitioner nor respondent states specifically when), member companies of CCTA unsuccessfully sought from the State refunds of monies paid pursuant to Connecticut's gross earning tax. Having failed in this endeavor, the companies, pursuant to Conn. Gen. Stat §12-2681, appealed the disallowances to the Superior Court of Connecticut.[3] These appeals, however, are being held in abeyance, according to CCTA, pending resolution of its petition for special relief.

3. CCTA initially filed its petition before the Commission on July 20, 1984. Connecticut opposed the petition. CCTA sought an extension of time in which to reply. Prior to CCTA filing any reply, on October 30, 1984, the Cable Communications Policy Act of 1984 (hereinafter "Cable Act") was signed into law, becoming generally effective on December 29, 1984.[4] In view of this new legislation, the Commission found its regulatory policy superseded and dismissed as moot all remaining pending requests for waivers and interpretations of §76.31 of the Commission's Rules.[5] *Order*, Mimeo No. 142 (released December 19, 1984). Subsequently, the Commission modified its rules to implement the provisions of the Cable Act, including, *inter alia*, deleting §76.31 of the Rules. *Cable Communications Act Rules*, 58 RR 2d 1 (1985), *modified*, 104 FCC 2d 386 (1986), *aff'd in pertinent part sub nom. ACLU v. FCC*, 823 F. 2d 1554 (D. C. Cir. 1987), *cert. denied*, 108 S. Ct. 1220 (1988). Following this decision, the Commission dismissed petitions for reconsideration of its earlier *Order*, *Yakima Valley Cablevision, Inc.*, Mimeo No. 35994 (released July 19, 1985).

4. On appeal to the United States Court of Appeals for the District of Columbia Circuit, the court found that the Cable Act's franchise fee provisions, with one exception not germane to this case,[6] were to have prospective effect, and that the Commission had not justified its retroactive change in policy. Accordingly, franchise fee disputes which arose prior to the enactment of the Cable Act, and which had been dismissed by the Commission, were remanded to the Commission for further consideration. *Yakima Valley Cablevision, Inc. v. FCC*, 794 F. 2d 737 (D.C. Cir. 1986). Pursuant to this decision, the Commission ordered parties whose petitions had concerned disputes arising prior to the Cable Act, and which had been dismissed by the Commission's 1984 *Order*, *supra*, to refile their petitions. *Yakima Valley Cablevision, Inc. v. FCC*, 1 FCC Rcd 268 (1986).

5. The parties to this proceeding raise both procedural and substantive issues. Prior to discussing the substantive merits of CCTA's and Connecticut's arguments, we will dispose of the procedural matters raised.

6. What is before us for resolution today is a franchise fee dispute involving circumstances that existed prior to enactment of the Cable Act. Except to the extent of directing our concern to only those fees paid (if any) that were in excess of 5%, the Cable Act has not affected this controversy. *Yakima Valley Cablevision, Inc. v. FCC*, 794 F. 2d at 747. *See also* note 6, *supra*. Accordingly, suggestions by parties concerning analysis of this case under the Cable Act are not germane to our resolution of the matter. Moreover, while Connecticut questions CCTA's standing to bring the instant dispute before us, Connecticut's challenge rests on Article III standing concerns. A federal administrative agency is not restricted by Article III constitutional considerations of "case or controversy", but is "free to hear action brought by parties who might be without party standing if the same issues happen to be before a federal court." *Gardner v. FCC*, 530 F. 2d 1086, 1090 (D.C. Cir. 1976). *See also Ecee, Inc. v. FERC*, 645 F. 2d 339, 349-350 (5th Cir. 1981). In addition, we do not believe that Connecticut's arguments concerning CCTA's standing are appropriately directed to us at this late stage in the proceedings. The instant matter has specifically been remanded to us by the appellate court,[7] and we shall proceed to a resolution on the merits.

SUMMARY

7. CCTA, in support of its contention that Connecticut's gross earnings tax on cable systems is in reality a franchise fee, points to the net effect of Connecticut's scheme of taxation of cable systems. Although the validity of the tax has previously been raised before the Commission, notes CCTA, in *Valley Cable Vision, Inc.* (Derby, Connecticut), 38 FCC 2d 959 (1972), *recon. denied*, 40 FCC 2d 191 (1973), and in *Coastal Cable TV Co.* (Groton, Connecticut), 47 FCC 2d 877 (1974), in each case the

Commission did not reach the question of whether the State's gross earnings tax was a franchise fee. Instead, the Commission found that the net effect of the State's scheme of taxation, which included exemption of cable systems from state property taxes, complied with the intent of the franchise fee rules and noted that the excess of gross earnings tax payments above that which the system would otherwise have had to have paid in property taxes was less than 3% of anticipated subscriber revenues. *Id.* at 879. Nevertheless, states CCTA, circumstances today have materially changed, so that the net effect of Connecticut's scheme of taxation is far in excess of 3% of subscriber revenues.[8] CCTA also states that because the gross earnings tax is not uniformly applied to all Connecticut businesses, the tax is a fee pursuant to *Arlington Telecommunications Corp. d/b/a ARTEC* (Arlington County, Virginia), 53 FCC 2d 757 (1975), and *Sammons Communications, Inc.* (Moses Lake, Washington), 61 FCC 2d 452 (1976). While cable systems and telephone companies are subject to a 9% gross earnings tax, notes CCTA, water, gas, and electric companies pay only 4% or 5% of gross earnings; railroads pay 2% to 3.5%; car companies pay 3%; telegraph companies pay 4.5%; express companies pay only 2%; and MDS, SMATV, LPTV, and newspaper entities pay no gross earnings taxes. Accordingly, argues CCTA, the tax cannot stand, and the Commission should issue a ruling invalidating the tax insofar as it exceeds 3% of gross subscriber revenues.

8. In opposition to CCTA, Connecticut argues that franchise fees are narrowly defined, and are only those sums designed to defray local regulatory expenses, or imposed as a *quid pro quo* for the use of public rights of way. DPUC, notes the State, imposes a single franchise fee on cable companies, with which the gross earnings tax cannot be compared. In fact, argues Connecticut, the Commission specifically distinguished state taxes from franchise fees in *Cable Television User Tax*, 50 FCC 2d 540, 543 (1974), and has maintained this distinction in subsequent cases. Even if the gross earnings tax is construed to be a franchise fee, contends Connecticut, it is permissible in any event because the net effect of the State's taxation scheme with respect to cable television -- assessing a gross earnings tax, but exempting cable systems from personal property taxes -- remains well below the 3% cap of §76.31 of the Rules.[9] In some cases, states Connecticut, the net effect is less than zero.[10] The State criticizes CCTA's contention that the net effect of Connecticut's taxation of cable systems exceeds the Commission franchise fee cap, and particularly argues that the affiant upon whom CCTA relies (*see* note 8, *supra*,) does not claim "any experience or expertise in the field of property appraisal or municipal taxation." CCTA's affiant, states Connecticut, "misrepresent[s] the probable personal property tax assessments" which cable systems would experience, which the systems themselves calculated without revealing their valuation methodology. Connecticut further states that its own submitted estimations of tax liability are more accurate than CCTA's, which would not be accepted by State assessors, because they fail to comport with the standard of Connecticut state law. Connecticut asserts that local cable companies have benefited from the State's taxation scheme, because taxing gross earnings, rather than personal property, results in low tax liabilities in the difficult early years of operation, thereby advancing the growth of cable television in furtherance also of national policies.

9. CCTA, in reply to Connecticut, in addition to reiterating its initial arguments, contends that Connecticut's claim that the State's pervasive regulatory scheme for cable television may allegedly benefit the industry does not free the scheme from compliance with §76.31 of the Rules. Indeed, claims CCTA, the Commission is not equipped to evaluate relative economic burdens of taxation, and should simply impose its franchise fee cap on Connecticut. CCTA disputes Connecticut's challenge of CCTA states that the affidavit was merely illustrative.[11] The only ruling CCTA states that it desires is "whether the Connecticut gross earnings tax is a franchise fee under its definition of the term and thus subject to the §76.31 percentage limit. The issue is one of definition, not amount." Specific disputes over individual systems' tax liabilities, states CCTA, will be resolved in other proceedings.

DISCUSSION

10. As a preliminary matter, we note that each party before us approaches the question raised by CCTA from a different vantage point. CCTA starts from the premise that the net effect of a tax is controlling on the question of whether or not a given tax is a fee, while Connecticut proceeds from the premise that taxes are simply not fees. Each party has focused on a portion of our developed policies in this area, but neither has assimilated the whole.

11. The issue of whether a state or local tax could be encompassed by our definition of a franchise fee was previously addressed by the Commission, in *Cable Television User Tax*, *supra*. The rule, we noted, "is addressed only to franchise fees, and its terms cannot fairly be stretched to cover the use taxes involved here." *Id.* at 543. Thereafter, in three subsequent cases, we clarified how we would determine when a particular levy was to be considered a tax not subject to the limitation of the Rule or a fee subject its restrictions. In *ARTEC*, *supra*; *University City Television Cable Co., Inc.* (Gainesville, Florida), 60 FCC 2d 498 (1976); and *Sammons Communications, Inc.*, *supra*, we held that a tax levied on cable television systems would not be circumscribed by our franchise fee cap if the tax were levied pursuant to legitimate authority, and if the tax were not imposed in a discriminatory fashion on cable television. While in *ARTEC*, 53 FCC 2d at 759, we noted that the tax in question was applied to all businesses in the county, such an all-encompassing scope is not necessary. As we recently found in *The City of Sunnyside, Washington and the City of Grandview, Washington*, 2 FCC Rcd 5971 (1987), it is sufficient to avoid being considered discriminatory, pursuant to former §76.31, that a tax such as Connecticut's be imposed on a category of business in which cable television is reasonably included. *See, e.g.*, *Sammons Communications, Inc.*, 61 FCC 2d at 453-454. In other words, while a franchise fee "may be defined as a charge, by whatever name, imposed by a governmental entity upon a cable television system, or upon a cable television subscriber, either solely because of their status as such, or by virtue of the power to grant public rights-of-way," *University City Television Cable Co., Inc.*, 60 FCC 2d at 500 (footnote omitted), a tax of general applicability will not meet this definition. It is evident from the foregoing that the question of the net effect of a tax is only relevant if the tax is a levy subject to §76.31 of the Rules. The initial questions which must be addressed, to see if a

given tax falls within the ambit of the rule, are whether the tax is legitimately imposed and whether it is levied in a discriminatory fashion.

12. No question has been raised here concerning the legitimacy of Connecticut's promulgation of the gross earnings tax. The next step in our inquiry, therefore, is to determine whether the tax is levied in a discriminatory fashion such as to bring it within the coverage of the Rule.

13. Discrimination has been used as part of the test for rule coverage because, having established a fee limit, we cannot, if the limit is to have any meaning, simply rely on changeable labels to determine whether a particular state or municipal levy should be subject to the limit as a fee or exempt from its coverage as a tax. Given the objective of the fee limit, to avoid undue burdens on interstate cable communications, definitional distinctions used elsewhere, such as whether the levy was imposed or accepted voluntarily (*National Cable Television Assn., Inc. v. U. S.*, 415 U.S. 337 (1974)) or as intended for general revenue raising or regulatory funding (*Cooley on Taxation*, 4th ed., Vol. 1 §27), are not appropriate here and would indeed be counterproductive to the intended goal of the fee limit. Single purpose taxes, imposed on cable in an unduly discriminatory fashion, do however raise all of the concerns relating to burdens on interstate communications that are intended to be addressed by the rule.

14. As did the taxes in question in *ARTEC, supra, Sammons Communications, Inc., supra*, and *The City of Sunnyside, Washington and the City of Grandview, Washington, supra*, which we found to be outside the scope of §76.31 of the Rules, Connecticut's gross earnings tax applies not only to cable television, but to a larger class including telephone, gas, electric, water, railroad car companies, railroads, telegraph, and express companies. However, Connecticut does not tax all these companies uniformly. Only cable television and telephone companies are taxed at 9%. Water, gas, and electric companies are taxed at 5%; telegraph companies are taxed at 4.5%; railroad car companies are taxed at 3%; railroad companies are taxed at 2% to 3.5%; and express companies are taxed at 2%. On its face, therefore, the Connecticut gross earnings tax appears to be discriminatory as applied to cable television. Unfortunately, due to the complexities of the exemptions that are available to telephone and cable companies but not to all other businesses subject to the gross receipts tax, we do not have sufficient information before us to render any final judgment on whether the tax is discriminatory as applied. Indeed, some of the information necessary to any final judgment is peculiarly a matter of Connecticut law and expertise. Telephone and cable, which are subject to a 9% gross receipts tax, may face roughly the same effective tax level as gas, water, and electric companies which pay 5% gross receipts tax but are subject to local personal property taxes as well. Whether there is "undue discrimination" within the class depends both on local personal property tax rates (mill rates) which vary within the state and are not set forth in the pleadings and on the proper method of personal property evaluation.[12] State law provides for a fair market value personal property assessment which the State argues variously should be defined as replacement cost, market value, or as related to income produced. CCTA in its filings uses the net book value of the assets involved.

15. Although we recognize, following the court's decision in *Yakima Valley Cablevision v. FCC, supra*, that the ultimate decision as to whether the fee limit of §76.31 has been exceeded rests with us, we believe that the issue of the operation of the state personal property tax system, which is hotly disputed by the parties, requires an authoritative determination of state law, either in the state court refund proceeding or otherwise.

16. In order to facilitate an end to this dispute, however, we believe it may be useful to set forth the structure of the analysis that appears to us necessary for a resolution. First, but for the effects of the personal property exemption, cable entities taxed at the 9% level appear to be subject to a "fee" as that is defined for purposes of the federal fee limit. Second, this would not be the case, if the State could show that there is a rough equality among the principal classes after the personal property exemption is taken into account. Finally, assuming there were found to be an undue discrimination bringing the tax under the fee limit, we would regard only that portion of the tax which was discriminatory as subject to the limit. Thus, for example, a general tax level of 5% with a discriminatory cable tax level of 9% would be interpreted, for cable, as a 5% tax and a 4% fee with only the fee subject to the federal limit. This would appear to bring the gross receipts tax within the permissible 5% levels for fees already paid prior to the adoption of the Cable Act,[13] but for the possible incremental effect of the specific additional fees that are imposed by Connecticut to cover the operating costs of its Department of Utility Control. The various fees would, however, have to be added together in order to reach any final conclusion.[14] Should further analysis or decision by us be required after any authoritative determination of the state tax law matters and application of the analysis set forth above, the parties are, of course, free to return to us for further action.

CONCLUSION

17. In view of the foregoing, we find that issuance of the ruling requested by petitioner is in the public interest only to the extent indicated in paragraph 16, *supra*.

18. Accordingly, IT IS ORDERED, That the petition for special relief (CSR-2684) refiled by the Connecticut Cable Television Association, Inc. on December 31, 1986, IS GRANTED to the extent indicated in paragraph 16, *supra*, and in all other respects IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Storer Communications, Incorporated (hereinafter "Storer"), which had filed comments in an earlier phase of this proceeding, in support of CCTA's petition, has not filed further comments.

[2] The Connecticut Siting Council also has jurisdiction to approve and site certain system equipment and structures.

[3] Docket Nos. CV 83-0285618--0285627, 83-0298038, and 83-0298041 (Conn. Super. Ct., Judicial District of Hartford-New Britain).

[4] Pub. L. No. 98-549, §1 *et seq.*, Stat. 2779 (1984).

[5] Former §76.31 of the Rules placed a 3% cap on franchise fees. This cap could be waived up to a maximum of 5%, if such fee were shown to be appropriate in light of a local regulatory program, and if the fee would not interfere with federal goals regarding cable television. The Cable Act caps franchise fees at 5%. It does not prescribe how the revenue generated therefrom may be used, and it bars the Commission from so doing. 47 U.S.C. §542.

[6] Fees previously paid which did not exceed the Commission's prior 5% cap were retroactively rendered lawful. *Yakima Valley Cablevision, Inc. v. FCC*, 794 F. 2d 737, 747-748 (D.C. Cir. 1986); *The City of Sunnyside, Washington and the City of Grandview, Washington*, 2 FCC Rcd 5971, 5973 n. 7 (1987).

[7] This was again noted with approval by the court in *ACLU v. FCC*, 823 F. 2d 1554, 1562 n. 18 (D.C. Cir. 1987).

[8] CCTA notes, based on an affidavit from its Executive Director, that the "net effect" of Connecticut's taxation scheme on Storer in 1984 was approximately 7.6%, and for the period of 1977-1984 was approximately 6% of revenues. The "net effect" in 1984 on Valley Cable Vision was 7%, while on Southern Connecticut Cablevision it was approximately 7.4%. CCTA cites these situations merely as examples to support its request for general ruling that the gross earnings tax is a franchise fee. CCTA's individual members would seek particular refunds in separate proceedings.

[9] The DPUC assessment fee, notes Connecticut, is itself well below the 3% cap; in 1983, cable companies in Connecticut paid 0.137% of their revenue to defray the State's regulatory expense.

[10] Connecticut states that Storer's system serving Hamden, New Haven, and West Haven in 1984 would have been subject to personal property taxes nearly twice as large as Storer's gross earnings tax, based on an affidavit from a Connecticut Department of Revenue Services supervisor.

[11] On April 9, 1987, Connecticut supplemented its showings, stating that CCTA gave an erroneous figure for Storer's tax liability, and that CCTA's valuation methodology is not acceptable under Connecticut law.

[12] Some effort was made in the pleading to calculate effective tax rates for cable after adding back the savings from the personal property tax exemption. A complete analysis would also require some accounting for the equivalent taxes paid by the other members of the class after including the personal property taxes they pay.

[13] *Yakima Valley Cablevision, Inc. v. FCC*, 794 F. 2d at 747.

[14] *See, e.g., Clarification of Rules and Notice of Proposed Rulemaking and Inquiry*, 46 FCC 2d 175, 202 (1975); *New York State Commission on Cable TV v. FCC*, 571 F. 2d 95 (2nd Cir. 1978), *cert. denied*, 439 U.S. 820 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-467

In the Matter of

Regulation of Small
Telephone Companies

Commission Requirements for Cost
Support Material to be Filed With
Annual Access Tariffs

Motions To Extend Time

ORDER

Adopted: December 28, 1988; Released: December 29, 1988

By the Chief, Common Carrier Bureau:

1. GTE Service Corporation and its affiliated domestic telephone operating companies (GTOCs) on December 15, 1988, filed a motion for deferral in the above-captioned matter. On December 20, 1988, Telephone and Data Systems, Inc. (TDS)[1] filed a similar motion. Both parties request a 90-day extension of time in which to file the data and responses required by the Commission's *Order Requesting Further Comment* (*Order*) in this proceeding.[2] That Order seeks to determine the extent of the burden imposed on National Exchange Carrier Association subset 2 carriers by the Commission's tariff filing requirements and, to that end, seeks information from those carriers. Comments in support of the motions were filed by United States Telephone Association and Alltel Corporation on behalf of itself and its operating subsidiaries.

2. Pursuant to the Commission's *Order*, local exchange carriers (LECs) are scheduled to submit the requested data on or before January 4, 1989. Both GTOC and TDS assert that they require an extension of time until April 4, 1989, in order to ensure adequate time to respond to the information requested by the Commission. They contend that the requested extension will allow the Commission sufficient time to evaluate the record and make a decision in this proceeding in time for the next annual filing on April 1, 1990. GTOC Petition at 3; TDS Petition at 2. Moreover, TDS argues that the Commission's data request goes beyond a simple compilation of readily available statistics and that it will take time to compile such data to provide the Commission with a useful record. TDS Petition at 2. Both GTOC and TDS maintain that adequate resources are not available during this period in which to prepare the data required by the *Order Requesting Further Comment*. Finally, they assert that the employees that could best respond to the questions posed in that *Order* currently are involved in compiling the Annual 1989 access tariff filing and will be involved in preparing responses during the tariff review period. GTOC Petition at 3; TDS Petition at 3.

3. The Common Carrier Bureau has reviewed the motions to extend time and the comments filed regarding the motions, and has concluded that good cause has been shown for an extension of time until March 1, 1989. We therefore grant all subset 2 carriers an extension of time until March 1, 1989, for filing the data required by the *Order Requesting Further Comment*. Interested parties may file their comments on the carriers' responses by April 3, 1989.

4. Accordingly, IT IS ORDERED that the motions to extend time filed by GTE Service Corporation and Telephone and Data Systems, Inc. ARE GRANTED to the extent specified herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Motion for Deferral of the GTE Telephone Companies, filed Dec. 15, 1988 and Motion for Extension of Time filed by Telephone and Data Systems, Inc., Dec. 20, 1988.

[2] Regulation of Small Telephone Companies, Commission Requirements for Cost Support Material To Be Filed with Annual Access Tariffs, Order Requesting Further Comment, FCC 88-356, released Dec. 6, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
U S West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs — AAD 7-1693

MEMORANDUM OPINION AND ORDER

Adopted: December 28, 1988; Released: January 9, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In the *Joint Cost Order*,[1] the Commission required certain subject carriers, including three U S West telephone operating companies (U S West),[2] to file manuals for separating the costs of regulated telecommunications services from the costs of nonregulated activities. In response to this requirement, U S West filed a cost allocation manual on September 1, 1987. That manual described U S West's nonregulated activities, listed the activities U S West proposed to treat as incidental activities, and provided information on U S West's affiliate transactions, employee time reporting procedures, and cost apportionment methods.

2. We reviewed that manual in the *U S West Order*,[3] and found that U S West would have to submit considerable additional information and reformulate many of its proposals before we would be able to verify that the manual meets Commission requirements in all respects. Despite these findings, we conditionally approved the manual. We determined that the manual provided adequate assurances against the misallocation of costs and revenues to permit its implementation on January 1, 1988. We required, however, that U S West submit revisions addressing a number of problem areas. We stated that these revisions would be subject to public comment and our review, and that we would take all appropriate action, including the prescription of specific apportionment procedures, in the event we disapproved any part of the revisions.[4]

3. U S West submitted its revisions on March 21, 1988, and further revised its manual on June 30, 1988, and on September 30, 1988. The March 21 revisions address the problem areas identified in the *U S West Order* and, according to U S West, reflect "a total rewrite" of the manual.[5] The Colorado Public Utilities Commission (Colorado PUC); the Colorado Office of Consumer Counsel, the Iowa Office of Consumer Advocate, the Minnesota Attorney General, and the Utah Committee of Consumer Services (collectively, Joint State Commenters); and MCI Telecommunications Corporation (MCI) commented on the March 21 revisions; and U S West replied. The June 30 revisions add development activities for nonregulated services to U S West's list of nonregulated activities and amend the affiliate transactions section of the manual. The September 30 revisions propose new cost pools to reflect the detariffing of Customer Dialed Account Recording, further amend the affiliate transactions section, and change U S West's apportionment methods for a number of accounts. No party commented on the June 30 or September 30 revisions.[6]

4. After reviewing the pleadings and U S West's revisions, we find, subject to certain exceptions, that the revisions are consistent with the Commission's requirements for cost allocation and properly implement the *U S West Order*. Before turning to the exceptions, we wish to emphasize that this Order does not discuss the many areas in which U S West has complied fully with Commission requirements and with the *U S West Order*. We also wish to emphasize that the exceptions are very limited in relation to the number of changes made in U S West's "total rewrite" of the manual and further revisions. Accordingly, we approve U S West's March 21, June 30, and September 30, 1988 revisions, subject to the filing of additional information and revisions specified herein. The filing shall be made no later than February 28, 1989.[7]

5. In the *U S West Order*, we stated that U S West would be required to make all revisions we approved or ordered effective as of January 1, 1988.[8] We recognize that such retroactivity may not be reasonably practicable with regard to certain additional changes we require in this Order. We direct U S West to make such changes effective January 1, 1988, to the extent possible, and to identify in the transmittal to its filing which changes, if any, it cannot reasonably implement as of January 1, 1988, and the justification for not implementing those changes retroactively.[9]

II. DISCUSSION

A. *Overall Sufficiency of the Revisions*

6. Under the *Joint Cost Order*, each cost allocation manual must describe the nonregulated activities, incidental activities, affiliate transactions, employee time reporting procedures, and cost apportionment methods of the telephone operating companies that will apply it. In the *U S West Order*, we required U S West to provide additional information and, in certain instances, entirely new proposals in relation to each of these areas. We were particularly concerned with U S West's methods for assigning costs to cost pools and for apportioning cost pools between regulated and nonregulated activities. We found that the manual provided little insight into these methods and, in certain instances when sufficient insight was provided, that U S West's proposals were inconsistent with the costing system established in the *Joint Cost Order*. Under that system, telephone companies must divide the accounts and subaccounts listed in the Commission's Uniform System of Accounts (USOA) into homogeneous cost categories or pools that can be directly assigned to, directly or indirectly attributed to, or allocated between regulated and nonregulated activities on cost causative bases.[10]

7. Although we ordered U S West to provide additional information regarding its cost pool assignment and apportionment methods, we did not require U S West to identify and justify the reporting codes, accounting records, and records of charges to accounts that support those methods. We determined, despite MCI's argument to the

contrary, that such information would not be necessary for us to evaluate U S West's overall apportionment system.[11]

8. In its March 21 revisions, U S West provides extensive information regarding its cost pool assignment and apportionment methods that the initial manual did not provide. MCI asserts that this information is too vague to ensure that users of U S West's regulated services will be protected from bearing costs associated with U S West's nonregulated activities. MCI argues that we must require U S West to provide more thorough descriptions of its cost pool assignment and apportionment methods in order to evaluate the manual properly and that we should require that information at this time. MCI claims that U S West's entire costing process continues to rely on the review and analyses of fundamental accounting records and reporting codes that the manual neither fully explains nor justifies. MCI contends that U S West should be required to describe these records and codes more precisely, and to justify using them as the basis for apportioning costs between regulated and nonregulated activities.[12]

9. MCI argues further that we should clarify the procedures we intend to employ in auditing and overseeing the cost allocation manual process. In MCI's view, these procedures should make clear that telephone companies must make their fundamental cost data available to their independent auditors and to the Commission, and should specify how the Commission intends to review and test that data. In addition, MCI maintains that we should state the processes we will employ to review independent auditor reports and to obtain any relevant cost data that the independent auditors do not review.[13]

10. In response, U S West contends that its revisions meet the requirements of the *U S West Order*, and that MCI has not shown how the supposed deficiencies in the manual might be corrected. U S West asserts that the manual is sufficient to let the Commission and the independent auditors evaluate the proposed costing process. U S West maintains that the manual need not include the fundamental cost data, analyses, cost studies, and other information upon which U S West intends to rely in applying the manual. According to U S West, that information will be available to the Commission and the independent auditors. Finally, U S West states that it will cooperate fully with its independent auditors and that MCI's concerns regarding the procedures the Commission might employ in reviewing independent auditor reports lie outside the scope of this proceeding.[14]

11. We find that U S West's revisions in this regard generally comply with the *U S West Order*. In that Order, we declined to require U S West to identify and justify the reporting codes, accounting records, and records of charges to accounts that support its cost pool assignment and apportionment methods. We found that requiring U S West to describe those methods in greater detail would be sufficient to eliminate any ambiguities and deficiencies in the manual.[15]

12. Our review of the manual confirms that it now contains sufficient information for us to evaluate virtually all of U S West's cost pool assignment and apportionment methods that do not involve the "analysis," "review," or "study" of transactions in which U S West might engage or of operations that U S West employees might perform. In the *U S West Order*, we required U S West to explain all its cost pool assignment and apportionment methods for two reasons. First, we wanted to ensure that the Commission, U S West, and the independent auditors would share a common understanding of U S West's manual. We are satisfied that the revisions generally achieve this purpose. A more detailed manual would not increase our ability or the independent auditors' ability to verify proper implementation of the manual.[16]

13. Our second reason for requiring additional information regarding U S West's cost pool assignment and apportionment methods was to enable us to review the substantive merit of those methods that U S West had not adequately explained. In most instances, the revisions contain sufficient information to let us perform this review. As discussed below, we require additional information regarding a limited number of U S West's cost pool assignment and apportionment methods. However, the Commission has determined that cost allocation manuals need not include the reporting codes, accounting records, analytical steps, and other procedures that that carriers develop to implement their apportionment methods.[17] Accordingly, we reject MCI's request that we require U S West to provide an additional level of detail regarding its overall cost pool assignment and apportionment methods.

14. We agree with MCI, however, to the extent it is arguing that U S West must expand its descriptions of the various "analyses," "reviews," and "studies" used to assign costs to cost pools and to apportion cost pools between regulated and nonregulated activities. In the *U S West Order*, we found that U S West had not made clear precisely what it contemplated in relation to these analyses, reviews, and studies, and we ordered U S West to describe the steps it would employ in performing them.[18] U S West's revisions are not fully responsive to this part of our Order.[19] Therefore, we require U S West to revisit each of its descriptions of its analyses, reviews, and studies. U S West shall expand each such description to the extent necessary to describe fully the underlying cost pool assignment method, and shall include the expanded descriptions in its further revisions.[20]

15. We also agree with MCI that the data gathering procedures and documentation underlying the apportionment procedures set forth in the manual are critical in any decision as to the reasonableness of the amounts assigned or apportioned to nonregulated activities. However, that does not justify inclusion of such material in the manual to the extent that the resulting document is so cumbersome as to obscure its primary purpose--the comprehensive description of how U S West complies with the Commission's cost apportionment policies and rules.[21] It may well be that our audits or our review of the independent auditor reports will reveal problems not with the apportionment procedures themselves, but with the underlying data collection and recording procedures. If this is the case, we will require revisions in the apportionment results and, if necessary, disallow for ratemaking purposes those costs that have been improperly included in the carriers' regulated accounts.

16. We also decline to specify the precise procedures we will employ in auditing and overseeing the cost allocation manual implementation process. While we intend to examine cost allocation and other accounting procedures in the course of our regular carrier audits and our review of independent auditor reports,[22] the procedures we will employ will be tailored to the circumstances we encounter. We emphasize, however, that telephone companies must retain a complete audit trail of all cost allocations and affiliate transactions, and must make that information as

well as the independent audit and all related data and workpapers available to the Commission.[23] We will, of course, require further changes to the manual in the event our own audits or our review of the independent auditor reports reveal a need for such action.[24]

B. ***Nonregulated Activities***

17. *Alarm Services.* In its initial manual, U S West listed spread spectrum alarm services as a nonregulated activity. After the Colorado Office of Consumer Counsel (Colorado) questioned that listing, we confirmed that U S West provides nonregulated alarm services. However, we required U S West to submit additional information regarding its apportionment proposals for alarm services so that we could determine whether those proposals meet Commission requirements.[25]

18. The revisions again list spread spectrum alarm services as a nonregulated activity, but state that the nonregulated portion of the services is restricted to scanning and routing features that Mountain States and Northwestern Bell have been providing pursuant to Commission waivers.[26] The manual states that the equipment that provides these features is used solely for nonregulated alarm services. U S West proposes to assign the costs of this equipment directly to nonregulated activities and to apportion a share of Mountain States' and Northwestern Bell's overhead costs to nonregulated activities in recognition of the features' nonregulated status.[27]

19. The Colorado PUC and the Joint State Commenters contend that U S West's proposals are inadequate. These parties assert that U S West uses subscriber loop plant and associated main distribution frames to provide alarm services, and that U S West is proposing to assign the costs of this plant directly to regulated activities. These parties argue that we should require U S West to use a fully distributed cost methodology to apportion costs to nonregulated alarm services.[28] Alternatively, the Joint State Commenters suggest, U S West should be required to pay either tariffed rates or a generally available public price for its nonregulated use of subscriber loop plant and associated main distribution frames.[29]

20. In response, U S West states that the orders which authorized Mountain States and Northwestern Bell to provide nonregulated alarm services distinguished between the regulated and nonregulated components of alarm services, and that the objections to its proposals for those services may have arisen from the revised manual's failure to distinguish adequately between these components. U S West asserts that the regulated component consists of the provision of a "spread spectrum" channel over a standard customer loop, that this function is provided at tariffed rates, and that the manual is correct in directly assigning the costs of the function to regulated activities.[30] U S West states further that the alarm services Mountain States and Northwestern Bell provide also include a nonregulated component that, according to U S West, "derives its regulatory status from the fact that the central office processor performs a code conversion . . . in order for the circuit switch to route the [spread spectrum] signal to the alarm company."[31] U S West maintains that separate processors perform this conversion and that "there are no joint costs relating to the loop (network plant or central office equipment) for which allocation through cost pools is necessary."[32]

21. In the *Loop Status Verification Service Order*,[33] we examined the regulatory status of alarm services identical to the spread spectrum services U S West offers. We stated that those services entail (a) a remote module located on the customer premises, (b) a central office component, and (c) a remote module located on the alarm company's premises. Provision of the first and third components is a nonregulated activity, and would be classified as such by U S West's manual.[34] The central office component may include both basic and enhanced services. We determined that spread spectrum alarm services are enhanced services to the extent they consist of the provision of code or protocol conversion functions.[35] Mountain States and Northwestern Bell provide code conversion to their alarm services customers, and U S West is correct in proposing to apportion the costs of these functions to nonregulated activities.

22. We also determined, in the *Loop Status Verification Service Order*, that scanning and routing that involve no code or protocol conversion, altering or restructuring of transmitted information, or subscriber interaction with stored information are basic services, even when provided in connection with alarm services.[36] U S West's proposal to assign its investment in subscriber loop plant and associated main distribution frames directly to regulated activities is consistent with this determination. Therefore, we will not require U S West to apportion that investment between regulated and nonregulated activities. U S West, of course, may continue to provide scanning and routing for alarm services under tariff.

23. U S West's description of its alarm services does not reflect our decision in the *Loop Status Verification Service Order* to classify scanning and routing that involve no code or protocol conversion, altering or restructuring of transmitted information, or subscriber interaction with stored information as basic services, even when provided in connection with alarm services. Therefore, we require that U S West clarify that description in its further revisions. Those revisions should also include any changes to U S West's apportionment methods for alarm services that might be required to reflect our decision.

24. *Customer Telecommunications Services.* In its March 21 revisions, U S West lists customer telecommunications services as a nonregulated activity. According to that manual, these services involve telecommunications plant "located on the customer's side of the demarcation point" and include the installation and maintenance of customer premises equipment (CPE) and inside wiring "as well as other services which carriers are allowed to provide."[37] The Colorado PUC maintains that this reference to "other services" is too general and that U S West should be required to define each nonregulated activity in which it engages.[38] U S West states, in response, that its initial manual included an identical reference to "other services" and that the *U S West Order* did not require that the language be revised.[39]

25. We believe that the reference to telecommunications plant "located on the customer's side of the demarcation point" appropriately limits the scope of the "other services" included within U S West's definition of customer telecommunications services. Therefore, we will not require U S West to revise that definition.[40]

26. However, the definition of customer telecommunications services provided in U S West's revisions states that "Trouble Isolation Charges (TIC) which are regulated in certain states . . . will be charged to Account 7991 for

Nonregulated activities and credited to the appropriate Regulated revenue accounts to the extent that TIC is included as part of Nonregulated Inside Wire Services."[41] This statement, which was not in U S West's initial manual, raises the question whether U S West is apportioning to regulated activities trouble isolation revenues and costs that are incurred in connection with inside wiring operations. In its further revisions, U S West shall describe in detail its accounting and apportionment practices with regard to trouble isolation costs and revenues.

C. *Affiliate Transactions*

27. *Introduction*. The affiliate transactions section of U S West's initial manual consisted of a very brief list of affiliates and activities.[42] In the *U S West Order*, we required U S West to describe more completely the nature, terms, and frequency of these activities and to clarify its basis for claiming that its proposals complied with the Commission's affiliate transactions rules.[43] U S West's revised affiliate transactions section consists of a general explanation of the principles involved and a relatively detailed table of the activities currently pursued. We find that, in general, U S West's revisions are adequate. Several aspects of the revisions, however, warrant discussion.[44]

28. *Provision of Services to Nonregulated Affiliates at Fully Distributed Costs*. U S West's March 21 revisions set forth a number of nontariffed services that the operating companies propose to provide to nonregulated affiliates at fully distributed costs.[45] The Joint State Commenters contend that U S West has failed to demonstrate that providing these services at fully distributed costs is consistent with the affiliate transaction rules. According to the Joint State Commenters, those rules preclude use of fully distributed costs unless (a) there are no market prices at which the operating companies offer these services to nonaffiliates, and (b) the operating companies provide all or substantially all of these services to their nonregulated affiliates.[46]

29. For "illustrative purposes," the Joint State Commenters analyze the revisions' treatment of the directory advertisement billing and collection services the operating companies provide to U S West Direct, Inc. (USWD), the nonregulated affiliate which publishes official white and yellow pages directories for U S West.[47] The Joint State Commenters observe that although the manual indicates that these services shall be recorded at fully distributed costs, it nowhere states that the operating companies provide virtually all of these services to USWD or that the operating companies do not provide these services at market prices to nonaffiliated entities. In fact, the Joint State Commenters add, the operating companies provide almost identical billing and collection services at market prices to nonaffiliated interexchange carriers and resellers.[48]

30. U S West replies that the affiliate transactions rules require that each nontariffed service that a carrier provides to a nonregulated affiliate be recorded at fully distributed costs, unless the carrier actually provides the service to a sufficiently large number of unaffiliated entities to establish a prevailing company price.[49] U S West contends that it is complying with this requirement. For each service in question, U S West states that it is not in the business of providing that service to nonaffiliates. In particular, U S West maintains that billing and collection of directory advertising revenue for USWD cannot be equated with billing and collection of telecommunications revenue for interexchange carriers and resellers because the latter involves unique functions such as call recording and message rating. Thus, U S West concludes, since the operating companies do not perform directory billing and collection services for any nonaffiliated users and since USWD does not receive such services from any nonaffiliated suppliers, the service must be recorded by the operating companies at fully distributed costs.[50]

31. Under the affiliate transaction rules, there are two methods a carrier may potentially employ to determine the costs it incurs in providing untariffed services to nonregulated affiliates: the market or prevailing company price method, and the fully allocated or fully distributed cost method. In the *U S West Order*, we addressed arguments that Colorado had raised regarding the applicability of these methods. We determined that the market or prevailing company price method may be used only when the service is "provided to a sufficient number of unaffiliated persons or entities to establish a prevailing price."[51] We also determined that absent such circumstances, the carrier must use the fully allocated or fully distributed cost method.[52]

32. It is unclear whether the Joint State Commenters are challenging the above standards, or whether they oppose the application of those standards in U S West's March 21 revisions. However, we find no reason to alter our prior treatment of this area. Actual transactions between the carrier and third parties, rather than mere offers to provide a service, are necessary to establish a market price for services that a carrier provides to a nonregulated affiliate.[53]

33. We also believe that U S West's revisions correctly apply the above standards. Contrary to the Joint State Commenters' position, a carrier need not demonstrate in its cost allocation manual that each of its proposals to apply the fully distributed cost method is consistent with the affiliate transaction rules. Instead, each such proposal constitutes an implied representation that the underlying transaction does not meet the conditions that would require application of the market or prevailing market price method.

34. Finally, we tentatively conclude that there is not adequate record support for the Joint State Commenters' position that the billing and collection services U S West's operating companies provide interexchange carriers and resellers are sufficient to establish a market price for the billing and collection services the operating companies provide to USWD. The functions of call recording, message rating and other activities involved in the operating companies' billing and collection service to interexchange carriers and resellers appear to have no parallel in the directory advertising context. However, we reserve the right to revisit this issue after we have had an opportunity to review U S West's 1988 cost allocation results in this area. If those data fail to disclose a significant difference between the types of billing in issue, we will take action, as appropriate, to insure that U S West's transactions are recorded in accordance with the affiliate transaction rules.

35. *White and Yellow Pages Operations*. U S West's initial manual listed the insertion of telephone operating company "logos (both white and yellow pages) within the various directory publications" as a service that U S West Direct (USWD) provides the operating companies.[54] That manual also listed "[s]eries of agreements to facilitate publication and distribution of directories" as a service the operating companies provide USWD.[55] Both of these services, the manual stated, were to be "provided at mar-

ket price."[56] In the *U S West Order*, we required U S West to verify that applying market prices to these transactions would be consistent with the affiliate transaction rules.[57]

36. In its March 21 revisions, U S West proposed a markedly different treatment of its white and yellow pages operations. Those revisions list, as services USWD provides the operating companies at prevailing company prices, the placement of "advertising and listings in telephone directories published by USWD" and "BOC advertising in Yellow Page directories nationally."[58] The revisions also list a series of services relating to white and yellow pages publication that the operating companies provide USWD. These services include the "[p]rovision of a mechanized interface to Telephone Master File data base" at fully distributed costs, and the "[g]ranting of non-exclusive, non-transferable license for one-time use" of subscriber lists, listing information, non-confidential daily listing business updates, and operating company owned directory listings at "[p]revailing company prices as provided to unaffiliated entities."[59] The revisions list, in addition, "[g]rant[ing] USWD the right to publish official telephone directories on BOC's behalf" as a service the operating companies provide USWD.[60] According to the manual, this service is to be provided at "FDC plus subsidy to BOC."[61]

37. The Joint State Commenters object to this final proposal. They contend that characterizing official directory publication as a service the operating companies provide USWD improperly reverses the true roles of the parties. These commenters claim that this approach is basically illogical and is inconsistent with the fact that directory revenue flows from the operating companies to USWD. Instead, the Joint State Commenters suggest, the manual should list directory publication as a service USWD provides the operating companies and specify that the service will be provided at fully distributed costs. The Joint State Commenters argue further that under U S West's proposal, the "subsidy" to the operating companies could be unilaterally decreased or discontinued altogether. Finally, the Joint State Commenters maintain that allowing USWD to charge the operating companies prevailing company prices for yellow pages advertising of the operating companies' own services, while the operating companies charge USWD fully distributed costs for the overall right to publish directories, would enable USWD to siphon off profits from regulated to nonregulated activities.[62]

38. U S West replies that its characterization of directory publication benefits the regulated operating companies because it entails a large "subsidy" for them from USWD. Moreover, U S West states, its description is reasonable because granting the "right" to publish the revenue-producing yellow pages bestows a thing of value on USWD, while granting the "right" to publish the non-revenue producing white pages in effect imposes an obligation on USWD. Thus, U S West reasons, publishing the white pages is part of the price which USWD pays to the operating companies in return for the right to publish and receive revenue from the yellow pages. U S West also states that virtually all USWD's revenue is from yellow pages advertising fees and, with the exception of the fees charged the operating companies for yellow pages advertising of their own services, there is no flow of revenue from the operating companies to USWD. Finally, U S West contends that no FCC regulation requires that carriers receive subsidies derived from directory advertising revenue and that, in any case, this is not the proper forum to debate the legal and policy issues which that subject involves.[63]

39. We tentatively conclude that U S West's treatment of white and yellow pages publication for cost allocation purposes is reasonable, and we will not require U S West to implement the Joint State Commenters' suggestion that the manual list white pages publication as a service that USWD provides the operating companies. We are concerned that the phrase "FDC plus subsidy to BOC" does not incorporate many of the obligations USWD has undertaken in exchange for its "right" to publish U S West's official yellow pages. Accordingly, we require U S West to state in its revisions each function that USWD will be performing in exchange for that right. That information is necessary if the manual is to state all the terms under which U S West publishes official directories.[64]

40. One of the Joint State Commenters' principal objections to U S West's treatment of white and yellow pages publication is that it reverses the traditional relationships between operating companies and publishing affiliates. The Commission, however, does not require carriers to structure their publication operations in traditional ways. On the contrary, a primary purpose of the cost allocation manual process is to enable carriers to structure their operations in the manner they deem appropriate, while providing adequate safeguards against the misallocation of costs to regulated activities.[65] The method chosen to prevent such misallocation is to require carriers to disclose, in their cost allocation manuals, the nature, terms, and frequency of their affiliate transactions in sufficient detail for us to evaluate them. As long as carriers provide that information, we should be able to ensure that the carriers comply with the affiliate transaction rules.

41. We recognize, of course, that the Joint State Commenters are concerned that USWD will remit only a portion of the revenue from yellow pages advertising to the operating companies. The Joint State Commenters apparently believe that this will deprive ratepayers of revenue that ought to be used to reduce rates for common carrier communication services. Carriers, however, are not required to use revenue from yellow pages advertising to reduce interstate rates. Indeed, the Commission classifies yellow pages publication as a nonregulated activity and precludes carriers from recovering any of the costs of that activity through interstate rates.[66] Once the manual discloses all the terms under which USWD publishes official directories for the operating companies, all safeguards necessary to prevent any such inclusion will be in place. Our approval of U S West's proposals for official directory publication, of course, will not affect the states' authority to use revenue from yellow pages operations to reduce the rates for intrastate common carrier communication services.[67]

42. We do not agree that the combination of costing arrangements that U S West proposes for the various transactions in which its affiliates will engage in connection with its overall white and yellow pages operations will allow U S West to siphon profits from regulated to nonregulated activities. The operating companies will be recovering more than their costs under the "FDC plus subsidy arrangement" proposed for USWD's white and yellow pages operations. Moreover, U S West's proposed use of prevailing company prices for certain services the operating companies perform in connection with white and yellow pages publication and for the yellow pages

advertising USWD provides the operating companies[68] is consistent with the affiliate transaction rules. Those proposals constitute implied representations that U S West provides the same services to a sufficient number of unaffiliated persons or entities to establish those prices as market prices.[69] Because unaffiliated persons and entities will have no incentive to subsidize U S West's operations, the prices should be sufficient to cover U S West's costs.[70]

43. *Sales Agency*. In its revisions, U S West lists the "marketing of telecommunications services and products" as a service that U S West Information Systems, Inc. (U S West Information) provides to the operating companies.[71] U S West states that U S West Information performs this service "as a non-exclusive, limited agent" pursuant to a sales agency agreement and is paid "Commissions . . . based on agency agreement on file with the FCC."[72] These terms appear to be inconsistent with the Commission's requirements for services that nonregulated affiliates provide carriers.

44. In the *U S West Order*, we stated that when a nonregulated affiliate provides a service to a carrier, a prevailing company price may be established when the carrier "receive[s] the service from a nonaffiliate a substantial portion of the time."[73] Although the terms U S West proposes for these sales agency services appear to be consistent with that statement, they are inconsistent with our subsequent reexamination of this area in the *NYNEX Compliance Order*. In that Order, we determined that under the affiliate transaction rules, carriers normally must record services provided by nonregulated affiliates at the affiliates' fully distributed costs.[74] We held that the only general exception to this costing methodology "permits the carrier to record an affiliate's services at the market rate 'when the same services are also provided by the affiliate to unaffiliated persons or entities.'"[75] This general exception applies only if the nonregulated affiliate also supplies the same services to nonaffiliate users in a sufficiently large number of cases to establish prevailing company prices.[76] Transactions between the operating companies and unaffiliated suppliers of the services are irrelevant to this general exception.

45. We believe that the interpretation of the affiliate transaction rules stated in the *NYNEX Compliance Order* is correct and should be applied to U S West. Under that interpretation, U S West's operating companies must record the instant sales agency transactions at the nonregulated affiliates' fully distributed costs because the affiliate does not provide the network marketing service to nonaffiliated companies. In its further revisions, U S West must specify terms for these transactions that are consistent with the above discussion. We recognize, however, that if the nonregulated affiliate receives only a small amount of the commissions paid pursuant to sales agency arrangements, U S West might argue that the commission is in effect a market price, and that the circumstances surrounding these transactions warrant an additional departure from the fully distributed cost requirement. If that is the case, U S West may petition for waiver of the rule.[77]

46. *Software Marketing*. The revisions also list "Software Marketing" as a service that U S West Knowledge Engineering, Inc. (U S West Knowledge) provides the operating companies. U S West states that U S West Knowledge "is a non-exclusive representative authorized to license certain software programs developed by the BOCs to nonaffiliated telephone companies" and is paid "Commission[s] . . . based on license agreement between [U S West Knowledge] and unaffiliated entities."[78] These terms also appear to be inconsistent with the Commission's requirements for valuing services that nonregulated affiliates provide carriers. U S West must clarify the nature of this transaction in its further revisions. In addition, although the revisions indicate that the operating companies will apportion to regulated activities any proceeds they receive from software sales,[79] the manual does not state that the operating companies will receive all such proceeds other than those paid for marketing services. U S West's further revisions shall provide such a statement if that is the case.

47. *Concession Telephone Service*. The Colorado PUC argues that U S West's revisions fail to disclose that the operating companies supply employees of nonregulated affiliates with concession telephone service. The Colorado PUC maintains that these services should be reflected at full tariffed rates in the affiliate transactions section.[80] U S West replies that such services were discontinued before January 1, 1988, the date the cost allocation manual took effect, and that it is therefore unnecessary to list them in the affiliate transactions section. Because the Colorado PUC has provided no support for its assertion, we will not question U S West's representation. We therefore reject the Colorado PUC's request.

D. *Official Communications*

Trial Electronic Mail Service

48. In the *U S West Order*, we found that the initial manual's treatment of official communications was inadequate because it did not require that tariffed services be recorded at tariffed rates. We suggested that an acceptable method would be to utilize the product of tariffed rates and existing usage data to determine the costs of official communications services and to apportion those costs by direct assignment, as much as possible, and then by allocation of the balance in proportion to total company wages and salaries.[81] In the March 21 revisions, U S West generally adopted this approach for those official communications services which it offers under tariff. In addition, those revisions provided methods for apportionment of the nontariffed components of its official communications services, consisting of the costs of certain station equipment and CPE and the costs of services obtained from interexchange carriers at their own tariffed rates.[82] We find these revisions satisfactory. There is, however, another problem arising from the interaction of this method with the method in U S West's June 30 revisions governing nonregulated service development costs, insofar as both methods apply to U S West's planned trial offering of internal electronic mail service.

49. In the March 21 revisions, the affiliate transactions section states that the operating companies are to provide electronic mail services for the internal use of the entire regional company, at the operating companies' fully distributed costs.[83] In the June 30 revisions, the nonregulated activities section includes "Development Activities for Nonregulated Services" as a new nonregulated activity.[84] This activity includes "preparation activities prior to introducing the product or service for public offering."[85] U S West states that the costs of those activities which are susceptible to time reporting are to be directly assigned to nonregulated activities, and that other costs are to be apportioned to this activity as indicated in the cost allocation table.[86]

50. Trial electronic mail service clearly constitutes both an official communications service and a development activity for nonregulated service. We believe that the costs of this development activity should be apportioned to nonregulated activities. We are concerned, however, that U S West may be applying the apportionment methods for official communications from its March 21 revisions to these nonregulated costs. We recognize, of course, that some of the costs U S West incurs in connection with its internal electronic mail trial may be closely related to provision of normal official communications services and should be apportioned as such. Nevertheless, U S West's cost manual must ensure that all of its nonregulated development costs are apportioned to nonregulated activities, and we direct it to revise its manual accordingly.

E. ***Apportionment Proposals***

51. *Enhanced Services.* In its revisions, U S West lists two enhanced services, protocol conversion and Customer Dialed Account Recording (CDAR), among the nonregulated activities in which it will be engaging during the near future. The apportionment proposals for protocol conversion differ from those in the initial manual and are generally consistent with our discussion of that service in the *U S West Order*.[87] CDAR is added as a nonregulated activity in response to the Commission's detariffing of that service.[88]

52. To provide protocol conversion and CDAR, U S West uses analog and digital electronic switching equipment that is also used to provide regulated services. When this joint usage is untariffed, U S West must apportion the expenses it incurs in using the equipment between regulated and nonregulated activities. We have problems with three aspects of U S West's apportionment methods for these expenses.

53. The first problem concerns Account 6211 - Analog electronic expense. U S West incurs this expense to provide tariffed services and CDAR. U S West has created a single cost pool in this account and proposes to apportion this pool in accordance with the "Regulated/Nonregulated assignment of total Account 2211, Analog Electronic Switching."[89] This proposal is inconsistent with the Commission's requirement that expenses for shared network plant be apportioned on the basis of current relative regulated/nonregulated usage.[90] Accordingly, we reject this apportionment factor. In its further revisions, U S West shall propose an apportionment factor for this account that complies with Commission requirements.

54. The second problem concerns both protocol conversion and CDAR. In Account 6212 - Digital electronic expense, U S West proposes to assign the expenses it incurs in connection with its untariffed, joint usage of digital electronic switching equipment to two "Common" cost pools. One of these pools would reflect expenses for protocol conversion and other packet switching operations. The other would reflect expenses for CDAR and other "File Network" operations. Although U S West proposes to measure relative usage of the equipment whose costs would be assigned to these pools, the manual states that the usage data are compiled on a quarterly basis for protocol conversion and on a semi-annual basis for CDAR. U S West states that it will use "[t]he previous quarter results . . . to assign current costs" for its protocol conversion operations and "[t]he previous semi-annual results . . . to assign current costs" for its CDAR operations.[91] These proposals are also inconsistent with the Commission's requirement that expenses for shared network plant be apportioned on the basis of current relative regulated/nonregulated usage. U S West must further revise its manual to specify that these cost pools will be apportioned based on current usage.[92]

55. The third problem also concerns both protocol conversion and CDAR. In Account 6532 - Network administration expense, U S West proposes to create "Common" cost pools that would be apportioned using the prior quarter and prior six month period usage measurements we have rejected for Account 6212. This proposal is inconsistent with the Commission's requirement that non-plant related operating expenses be apportioned on the basis of current relative regulated/nonregulated usage.[93] U S West must also apportion these cost pools on the basis of current usage.

56. *Wages and Salaries for Construction Projects.* In its initial manual and in its March 21 and June 30 revisions, U S West proposed to use its apportionment results for one or more of its expense accounts to apportion a number of its cost pools. For certain cost pools, these proposals failed to recognize U S West's practice of recording in investment accounts those wages and salaries that are incurred for construction projects. U S West's September 30 revisions propose to "clarif[y]" the apportionment factors for those cost pools "to include wages and salaries of personnel who support both expense and capital projects . . . ."[94] While we concur in U S West's attempt to recognize that it records wages and salaries in investment as well as expense accounts, the apportionment bases the September 30 revisions specify for these pools all reference the "Regulated/Nonregulated assignment of total prior month's investment portion of [various 2XXX accounts] and total prior month's expense portion of wages and salaries in [various 6XXX accounts]."[95] We find U S West's language confusing. If U S West intends to apportion these cost pools in proportion to the relative apportionment of the wages and salaries recorded for the prior month in the investment and expense accounts that U S West lists, it shall specify such apportionment factors in its further revisions.

F. ***Individual Accounts***

Account 1220 - Material and Supplies

57. *Repair and Maintenance Costs.* In its initial manual, U S West proposed to create a "Station Connections Material" cost pool within this account that would be apportioned between regulated and nonregulated activities based on U S West's analysis of specific entries to corresponding company subaccounts. In the *U S West Order*, we stated that U S West's revisions must explain both the contents of this cost pool and the nature and scope of this analysis.[96] U S West's revisions state that this cost pool contains the costs of "minor items of plant supplies used in station connections construction, repair, and maintenance."[97] U S West proposes to apportion this cost pool in accordance with a "Quarterly study of Regulated/Nonregulated Minor Material Allocation."[98] According to U S West, this apportionment method involves loading costs onto "direct labor hour[s] reported to station connection construction expense field reporting codes."[99]

58. We believe that loading the costs of repair and maintenance supplies onto construction-related labor hours results in an inaccurate apportionment of the costs between regulated and nonregulated activities. Therefore,

in addition to describing fully the methodology to be employed in its minor material study,[100] U S West's further revisions shall propose a new apportionment method for these repair and maintenance costs.

59. *Inside Wiring*. U S West's revisions propose a new cost pool within this account for "Common" material and supplies investment. This cost pool, according to U S West's proposals, would be apportioned in accordance with the relative apportionment of a number of investment accounts, including Account 2321 - Customer premises wiring.[101] That account consists of inside wiring costs capitalized prior to October 1, 1984, and is being directly assigned to regulated activities.[102]

60. We find this proposed apportionment factor defective for two reasons. First, U S West should be holding no materials and supplies in stock for inside wiring work performed prior to October 1, 1984. Therefore, including investment recorded in Account 2321 in the calculation of the factor is improper. In its further revisions, U S West must eliminate Account 2321 from this apportionment factor. Second, the factor implies that the "Common" cost pool contains material and supply costs incurred to support current or future inside wiring activities, and that these costs should be apportioned to regulated activities. Any such costs, however, should be apportioned to nonregulated activities.[103] U S West's further revisions must also clarify whether this account contains costs incurred to support current or future inside wiring activities and, if so, show how those costs will be apportioned to nonregulated activities.[104]

Account 2002 - Property Held for Future Telecommunications Use and Account 2003 - Telecommunications Plant under Construction - Short Term

61. In the *U S West Order*, we required U S West to assign significant portions of the investment in these accounts directly to regulated and nonregulated activities.[105] In its revisions, U S West states that the balances in these accounts are maintained at the same level of specificity as the related plant accounts and that this account will be apportioned using the "Regulated/Nonregulated assignment of the corresponding Field Reporting Code (FRC) of the related 2111 through 2690 investment accounts."[106] In their comments, the Joint State Commenters contend that this apportionment method does not comply with our direct assignment mandate.[107] U S West replies that the manual provides for the direct assignment of amounts recorded in Accounts 2002 and 2003 based on related investment accounts.[108]

62. We construe U S West's revisions, as explained in its reply, as stating that it has created cost pools within these accounts paralleling the cost pools that it has created within the related plant accounts, and that each of these cost pools within Accounts 2002 and 2003 will be apportioned using the methodology the manual specifies for the corresponding cost pool in the plant accounts. Since that method should provide for direct assignment to the maximum practicable extent, we approve it. However, to prevent any possible future confusion regarding this matter, we require that U S West clarify its apportionment method for these accounts.

Account 2111 - Land and Account 2121 - Buildings

63. *Method for Assigning Costs to Pools*. In its initial manual, U S West proposed to perform a "periodic study of floor space usage" to assign its land and building investment to cost pools, but did not explain its study methodology.[109] After we ordered U S West to explain that methodology,[110] U S West revised its manual to provide some additional information regarding this study. The revisions indicate that the study will be performed annually and will identify the number of square feet used for each of the functional categories for which U S West has costs pools within these accounts. The revisions state that U S West will apply ratios developed from the square footage figures to its total land and building investment within each state.[111]

64. We believe that U S West's method is not cost causative, because it fails to recognize that land and building costs vary with building function. Therefore, we require U S West to assign its land and building costs to cost pools on a building-by-building basis, as follows. First, when U S West expands its description of its floor space usage study,[112] U S West shall state that it will identify the number of square feet within each of its buildings that are used for each of the functional categories for there are costs pools within these accounts. Second, for each of its buildings, U S West shall divide these square footage figures by its total square footage within that building to determine the percentage of the building that supports each of U S West's functional categories. Third, U S West shall multiply each of these percentages by U S West's investment in the building to which it relates and in the land associated with that building to determine the investment to be assigned for that building to each of U S West's cost pools within Accounts 2111 and 2121. This process shall be repeated for each building in which U S West has investment and for the land associated with each such building to determine the total investment to be assigned to those cost pools. In addition, U S West shall update this study whenever significant changes to its land or building usage occur.[113] U S West shall amend its manual accordingly.

65. *Inside Wiring*. The functional categories for which U S West has created cost pools within Accounts 2111 and 2121 include "Garage, Storeroom, Yard Space." In its initial manual, U S West proposed to apportion these cost pools between regulated and nonregulated activities "based on prior month's Material and Supplies, Account 1220."[114] After we ordered U S West to explain this apportionment method,[115] U S West proposed to apportion these cost pools in proportion to the "Regulated/Nonregulated assignment of total prior month's Account 1220, Material and Supplies."[116] U S West states that this method apportions land and building space based on the functions occupying that space.[117]

66. We believe that U S West's apportionment method for this cost pool will result in an underapportionment of land and building costs to inside wiring installation and maintenance operations. That method, to the extent it reflects inside wiring operations at all, reflects only the costs of "minor items of plant supplies used" in those operations.[118] It implies that U S West either (a) uses the the land and buildings whose costs are assigned to these "Garage, Storeroom, Yard Space" pools for no function relating to inside wiring operations other than the storage of these minor items or (b) incurs costs for the other functions that are provided in the same proportion as it

incurs storage costs. Neither of these possibilities appears likely. Therefore, we require U S West to clarify this matter in its further revisions. If U S West uses the land and buildings in these pools to provide overall support for its inside wiring operations, it must propose a new apportionment factor for these pools, such as relative wages and salaries, that reflects the labor intensive nature of those operations.[119] If U S West does not use the land and buildings in these pools to provide overall support for its inside wiring operations, then the further revisions must show in detail how U S West's overall apportionment method for these accounts reflect inside wiring support functions performed on land or in buildings.

Account 2112 - Motor Vehicles

67. U S West's initial manual included a cost pool for vehicles having a "GVW [gross vehicle weight] of 6500 pounds or less except passenger cars" that was to be apportioned "based on [the] prior month's Plant Operations expense, Accounts 6112 through 6540."[120] Although Colorado contended that U S West should use time reporting to apportion this investment, we declined to adopt that suggestion. We required, however, that U S West state in its revisions why its proposed apportionment method would produce reasonable results for this cost pool, and we indicated that we would not permit U S West to apportion this cost pool in proportion to plant operations expense if we were to find that the pool supports support activities other than plant operations.[121]

68. U S West's March 21 revisions propose to apportion this cost pool in proportion to the "Regulated/Nonregulated assignment of total prior month's Accounts 6231 through 6441, plant specific operations expense."[122] Those revisions state that the vehicles whose costs are assigned to this pool "are *generally* not used to support activities other than plant operations."[123]

69. The Joint State Commenters express two concerns about U S West's proposal. First, they argue that U S West should clarify its use of "generally" and show how the proposed apportionment factor complies with the *U S West Order*.[124] In reply, U S West promises to disaggregate this cost pool into separate pools for plant operations support vehicles and other vehicles. U S West states that the "Other" pool will reflect the costs of vehicles used for mail delivery, shuttling passengers, and other miscellaneous purposes, and will be apportioned using the general allocator.[125] U S West's September 30 revisions include the cost pool promised in its reply pleading. We believe that this pool eliminates the Joint State Commenters' concern regarding the function of U S West's light vehicles and that it is appropriate to apportion the new pool using the general allocator. Accordingly, we concur in these aspects of the September 30 revisions.

70. Second, the Joint State Commenters reiterate Colorado's prior argument in favor of using time reporting to apportion motor vehicle costs.[126] In reply, U S West states that it is already using time reporting to apportion its investment in light vehicles other than passenger cars, since direct time reporting causes expenses to be recorded in Accounts 6231 through 6441.[127] U S West appears to be using time reporting to the maximum practicable extent to apportion both of these cost pools for light vehicles other than passenger cars. Therefore, we will not require U S West to make further revisions to its apportionment methods for the costs of those vehicles.

Account 2681 - Capital Leases

71. In its initial manual, U S West did not describe its cost pool assignment method for this account; and we ordered U S West to explain that method.[128] In its revisions, U S West states that its method includes a "semi-annual review of leased property floor space usage records."[129] Although U S West has not described this review process,[130] we assume it is similar to the process U S West proposed for its investment in owned buildings. Consistent with our treatment of that investment,[131] we require U S West to amend its manual to specify that it will use square footage ratios calculated on a building-by-building basis to apportion its investments in buildings that are subject to capital leases.

72. Many of U S West's capital leases are for buildings, motor vehicles, and computers, and U S West has created cost pools for its investment in such leases. The initial manual proposed to apportion these cost pools using the methodology that U S West had proposed for investment in owned buildings, motor vehicles, and computers. In the *U S West Order*, we explicitly approved this proposal to the extent it related to shared capital lease investment.[132] Despite that explicit approval, U S West's revisions propose to apportion shared capital lease investment in buildings, motor vehicles, and computers in proportion to the apportionment of U S West's shared investment in owned buildings, motor vehicles, and computers.[133] U S West's proposal assumes that U S West uses leased buildings, motor vehicles, and computers in the same proportions as it uses similar owned plant. We are not certain that this assumption is accurate. Therefore, we require that U S West's further revisions specify that shared capital lease investment be apportioned using the same methodology as the manual specifies for similar investment in owned plant.[134]

Account 2682 - Leasehold Improvements

73. In its initial manual, U S West proposed to apportion its investment in leasehold improvements for buildings in proportion to its relative investment in owned buildings. In the *U S West Order*, we stated that improvements made to leased property may have little to do with the relative use of owned buildings, and we required U S West to apportion this this account on a more cost causative basis. We suggested individual analysis of its leasehold improvements as one method that might be appropriate.[135] In its March 21 revisions, U S West proposed to assign its investment for leasehold improvements in buildings to a single "Buildings" cost pool that would be apportioned in proportion to its relative investment in leased buildings.[136]

74. After U S West made this proposal, the Joint State Commenters asserted that our objection to U S West's initial proposal applies equally to U S West's proposal to apportion leasehold improvement investment in proportion to relative investment in leased buildings. The Joint State Commenters contend that U S West should be required to apportion its "Buildings" cost pool on the basis of its individual analysis of leasehold improvements.[137] In reply, U S West argues that its records are not kept at a level of detail that would allow leasehold improvement investment to be directly assigned to regulated and nonregulated cost pools, and its March 21 proposal complies with our requirement for a cost causative method for apportioning leasehold improvement investment.[138] However, U S West's September 30 revisions propose to sub-

divide the "Buildings" cost pool in Account 2682 into separate "Regulated," "Nonregulated," and "Common" cost pools in accordance with "a semi-annual review of leasehold improvement records. The first two cost pools would be directly assigned to regulated and nonregulated activities. The "Common" cost pool would be apportioned between regulated and nonregulated activities in proportion to the relative apportionment of U S West's investment in buildings other than central office equipment and antenna supports."[139]

75. We agree with the Joint State Commenters that U S West's March 21 proposal for this account is not cost causative. We believe, however, that the September 30 revisions are responsive to the Joint State Commenters' concerns. Once U S West explains the review of leasehold improvement records it will be conducting,[140] the manual should make clear that U S West is analyzing each of its leasehold improvements to determine their cause. However, we continue to believe that apportioning leasehold improvement investment in proportion to relative building investment is improper. Accordingly, we disapprove U S West's September 30 revisions to the extent they propose apportioning the "Common" cost pool in Account 2682 in proportion to relative building investment. This cost pool corresponds to a "Common" cost pool that U S West has created within in Account 2681. Since we are requiring U S West to apportion this cost pool within Account 2681 using the same methodology as the manual specifies for owned plant, we believe it appropriate to apportion the "Common" cost pool in Account 2682 in proportion to the relative apportionment of the corresponding cost pool in Account 2681. U S West shall provide for such an apportionment in its further revisions.

Account 4320 - Unamortized Operating Investment Tax Credits - Net and Account 7210 - Operating Investment Tax Credits - Net.

76. In the *U S West Order*, we required U S West to provide additional details as to the nature, frequency, and scope of its tax department studies. We required that material to assess Colorado's suggestion that Investment Tax Credits (ITCs) be allocated based on plant vintage, rather than, as U S West proposed, on related plant in service accounts as determined by a study. In Colorado's view, the proper allocation of ITCs required that the carrier identify the vintage of the plant giving rise to the tax credit.[141]

77. U S West has outlined the methodology that it would have to follow to allocate ITCs based on vintage. The Joint Commenters assert that, based on their review of that narrative, they do not propose that deferred operating income taxes be allocated on the basis of vintage. However, they maintain that such vintage allocation of ITCs is possible and not unduly costly. U S West asserts, however, that vintage assignment of ITCs would presume such assignment of related plant balances, and that vintage assignment of plant related depreciation reserves wold be extremely costly but would produce no benefit. We have reviewed U S West's narrative as to the nature of its tax studies and what actions would be required for vintage assignment of ITCs. We agree that the costs incurred in implementing such a procedure would exceed any benefits to be derived therefrom. Accordingly, we do not require a change in U S West's manual in this regard.

Account 5301 - Uncollectible Revenue - Telecommunications, Account 5302 - Uncollectible Revenue - Other, and Account 7991 - Other Nonregulated Revenues

78. In its initial manual, U S West proposed to assign Accounts 5301 and 5302 directly to regulated activities and Account 7991 directly to nonregulated activities. Since we were not certain that these proposals matched uncollectible revenues with the activities that caused them, we directed U S West to apportion Account 5301 in proportion to relative telecommunications revenue and Account 5302 in proportion to relative non-telecommunications revenues.[142]

79. U S West's revisions again propose to assign Accounts 5301 and 5302 directly to regulated activities and Account 7991 directly to nonregulated activities. U S West states that Accounts 5301 and 5302 contain only uncollectible revenue related to regulated activities and that uncollectible revenue related to nonregulated activities is recorded in Account 7991.[143] The revisions do not state, however, the criteria U S West employs to divide its uncollectible revenue among these accounts.

80. Although U S West's revenue accounting procedures appear consistent with the Commission's present accounting rules, the *Further Reconsideration Order* deleted Account 7991 and added Account 5280-Nonregulated operating revenue.[144] Those rule changes will become effective on May 22, 1989. U S West must revise its manual to list Account 5280 prior to that effective date.[145]

81. In addition, it is essential to our monitoring efforts that the manual specify the criteria U S West employs to divide its uncollectible revenue among Accounts 5301, 5302, and 5280 or 7991. Therefore, we require that U S West specify those criteria in its further revisions. U S West's criteria shall be consistent with our prior directive that uncollectible revenue related to telecommunications activities be apportioned in proportion to relative telecommunications revenue and that uncollectible revenue related to non-telecommunications activities be apportioned in proportion to relative non-telecommunications revenue.

Account 6121 - Land and Building Expense

82. In its initial manual, U S West proposed to create a cost pool for rent expense within this account that would be apportioned between regulated and nonregulated activities using the methodology U S West was proposing for its building investment.[146] Although we approved that proposal, U S West's revisions propose to subdivide this cost pool into separate "Regulated," "Nonregulated," and "Common" cost pools. The first two cost pools are to be directly assigned to regulated and nonregulated activities. The "Common" cost pool is to be apportioned between regulated and nonregulated activities in proportion to the relative apportionment of U S West's investment in buildings other than central office equipment and antenna supports.[147]

83. U S West's proposals for this account are similar to its proposals for its capital lease investment in Account 2681. Like capital lease investment, rent expenses vary with building function and are unrelated to building investment. Therefore, consistent with our treatment of Account 2681, we require U S West to specify in its further revisions that it will use square footage ratios calculated on a building-by-building basis to assign its rent expense to cost pools and will use the same methodology as the

manual specifies for owned buildings to apportion its "Common" cost pool in Account 6121 between regulated and nonregulated activities.[148]

Account 6512 - Provisioning Expense

84. In the *U S West Order*, we required U S West to clarify its proposals for this account.[149] U S West's revisions state that the apportionment basis for this account will be the "Regulated/Nonregulated assignment of total Account 2111 through 2690."[150] U S West claims that its provisioning expense supports its investment in telephone plant in service.[151]

85. We find U S West's proposal defective for reasons similar to those previously discussed in relation to U S West's "Common" cost pool within Account 1220.[152] U S West's apportionment factor for Account 6512 incorporates its results for Account 2321, an account that U S West is directly assigning to regulated activities. U S West, however, incurs no provisioning expense in connection with amounts recorded in Account 2321 and should be apportioning to nonregulated activities all provisioning expense incurred in connection with inside wiring operations. U S West's further revisions shall propose a new apportionment method for this account that apportions that expense to nonregulated activities.

Account 6623 - Customer Services

86. In the *U S West Order*, we required U S West to reformulate and explain various aspects of its proposals for customer services expense.[153] U S West's revisions present new proposals for that expense. We have already required U S West to explain the analyses and studies referenced in those proposals.[154] Three additional aspects of the proposals create problems.

87. The first problem concerns a company subaccount for "Customer Services Operations" that U S West maintains for expenses incurred in initiating customer service orders and records, and in instructing customers in the use of products and services. U S West proposes to divide this subaccount into "Regulated," "Nonregulated," and "Common" cost pools. The first two pools would be directly assigned to regulated and nonregulated activities. The "Common" pool would be apportioned between regulated and nonregulated activities "based on the relationships of 6623 Regulated and 6623 Nonregulated."[155] It is unclear whether this apportionment factor refers to the results for the "Regulated" and "Nonregulated" cost pools within this company subaccount or to those results as well as the results for the five additional cost pools U S West maintains within Account 6623. In its further revisions, U S West must clarify this apportionment factor.

88. The second problem concerns the customer services expenses that U S West incurs in connection with its packet switching network. The services provided in connection with that network include both regulated services provided at tariffed rates and nonregulated protocol conversion services, and the manual indicates that U S West's "Customer Services Operations" subaccount includes expenses related to both types of services.[156] The manual does not state, however, the cost pools to which these expenses would be assigned, the criteria U S West would employ in making the assignments, or why "the relationships of 6623 Regulated and 6623 Nonregulated" might produce an accurate apportionment of those packet switching expenses, if any, that might be assigned to the "Common" pool within this subaccount. U S West's further revisions must also clarify the treatment of all customer service operation expenses incurred in connection with its packet switching network.

89. The third problem concerns the "Customer Billing and Remittance" cost pool that U S West maintains within Account 6623. U S West proposes to apportion this cost pool in accordance with the "[r]elationship of Regulated to Nonregulated lines on a customer bill."[157] U S West states that the "[t]otal lines billed are identified for billed messages and billed services" and that "[a]n assignment ratio is calculated by dividing Nonregulated billed services by the total of billed messages and billed services."[158] We agree that any apportionment method for this cost pool should begin with the identification of the total number of billing lines on customer bills. However, U S West's "assignment ratio" implicitly assumes that U S West incurs identical billing costs for each of its messages and services. We find no basis for that assumption and instead believe that billing costs are proportionate to billing lines. U S West's further revisions shall propose an apportionment method for this cost pool that reflects that belief.

Account 6711 - Executive and Account 6712 - Planning

90. In its March 21 revisions, U S West proposed new apportionment methods for these accounts. For Account 6711, those revisions listed a "Planning - Corporate Services" cost pool that was to be apportioned based on the "Regulated/Nonregulated assignment of total Account 6712, Corporate Planning."[159] U S West stated that this cost pool reflected the costs of providing executive direction for the functions charged to Account 6712.[160] For Account 6712, the March 21 revisions proposed two cost pools, a "Nonregulated" cost pool and a "Common" cost pool that was to be apportioned based on the "Regulated/Nonregulated assignment of total prior month's Account 6711, Executive Expense."[161] U S West stated that this "Common" pool consists of planning costs that support executive decision and policy making."[162]

91. In their comments, the Joint State Commenters object to these proposals. They assert that the apportionment methods proposed for these accounts in the March 21 revisions are circular because U S West was proposing to apportion each account on the basis of results for the other account. The Joint State Commenters also argue that it is inappropriate to apportion the "Common" cost pool in Account 6712 in proportion to the overall results for Account 6711. The Joint State Commenters believe that U S West's planning expense is not causally related to other cost pools within Account 6711.[163]

92. In reply, U S West's claims that its March 21 apportionment methods are not circular because results for the prior month, not current results, were to be used. U S West maintains, in addition, that all aspects of its business have an "executive need for planning information to make sound business decisions" and that it is appropriate to apportion planning expense in proportion to executive expense.[164] However, in its September 30 revisions, U S West proposes to apportion both its "Planning - Corporate Services" cost pool in Account 6711 and its "Common" cost pool in Account 6712 in proportion to its overall apportionment of all expense accounts for the prior month.[165]

93. In its March 21 revisions, U S West stated that the "Planning - Corporate Services" cost pool in Account 6711 reflects the costs of providing executive direction for the functions charged to Account 6712. Those revisions also stated that the "Common" cost pool in Account 6212 consists of planning costs that support a wide variety of executive decision and policy making. We believe that subsequent revisions have not changed the nature of these cost pools and, therefore, that U S West's March 21 statements remain accurate. In these circumstances, we see no basis for approving U S West's September 30 proposals to apportion these cost pools in proportion to overall expense accounts results for the prior month.

94. While we accept U S West's position that all executive functions require planning support, we share the Joint State Commenters' concerns regarding of the apportionment factors the March 21 revisions proposed for these cost pools. Those factors are inappropriate because they assume that two types of expense cause each other.[166] U S West shall eliminate this problem by apportioning its "Common" cost pool in Account 6712 in proportion to the overall apportionment of all cost pools in Account 6711 other than its "Planning - Corporate Services" cost pool and its "Executive Services - Other" cost pool. That latter cost pool also incorporates the results for the "Planning - Corporate Services" cost pool.

Account 6721 - Accounting and Finance

95. In its March 21 revisions, U S West proposes a new, "Jurisdictional Separations" cost pool to be directly assigned to regulated activities. In their comments, the Joint State Commenters request clarification whether this cost pool includes functions that support the cost manual process. Such support would be provided, according to the Joint State Commenters, if the jurisdictional separations data base were an input into the cost manual process.[167] In its reply, U S West confirms that its cost manual process is complete prior to the performance of the functions whose costs are assigned to its "Jurisdictional Separations" cost pool.[168] Therefore, we approve U S West's proposal to assign this pool directly to regulated activities.

Account 6726 - Procurement

96. U S West's initial manual proposed one cost pool for this account, which was to be apportioned "based on total expenses in [Accounts 6110 - 6790], less wages and salaries."[169] In the *U S West Order*, we found that proposal insufficient and ordered U S West to divide Account 6726 into homogeneous cost pools that can be directly assigned to, or allocated between, regulated and nonregulated activities on a cost causative basis.[170] In its revisions, U S West proposes two cost pools. The first, for "Plant Materials," would be apportioned based on the "Regulated/Nonregulated assignment of total Material and Supplies, Account 1220." The second, for "Expense Materials," would be apportioned based on the "Regulated/Nonregulated assignment of Accounts 6112 through 6790, Operations Expense, less wages, salaries, and depreciation."[171]

97. The Joint State Commenters claim that U S West has not complied with our requirement that this account be divided into homogeneous cost pools. They argue that each of U S West's cost pools is heterogeneous, because each includes costs relating to outside plant and central office equipment as well as other items. They recommend that we require U S West either to justify its proposed methodology or further revise its manual to implement our prior directive.[172] In reply, U S West maintains that the materials procured by its purchasing personnel are normally very fungible in nature and that their ultimate use cannot be determined at the time of purchase.[173]

98. Unlike U S West's initial method for apportioning its procurement expense, the present method distinguishes between procurement for new construction and procurement for existing facilities and operations. We believe that U S West's revisions are, therefore, responsive to our requirement that U S West improve its apportionment method for this account. We also believe that it would be inappropriate to require procurement personnel to distinguish among a series of procurement categories on the basis of the intended use of the items being purchased. Therefore, we decline to implement the Joint State Commenters' suggestion that we require U S West to create additional cost pools within this account.

Account 7220 - Operating Federal Income Taxes, Account 7230 - Operating State and Local Income Taxes, and Account 7250 - Deferred Operating Income Taxes

99. In its initial manual, U S West proposed different methodologies for apportioning current income taxes and deferred taxes. We concluded that applying different apportionment bases to any of these accounts could result in the assignment of costs that is not consistent with related book income.[174] We directed U S West to apportion the total income tax (including Account 7250) for the period on the basis of book income. In its revisions, U S West apportions Accounts 7220 and 7230 on relative book income. However, it retains the use of numerous cost pools in Account 7250, and apportions some of those cost pools on the basis of investment.

100. U S West's revisions do not comply strictly with our requirement in the *U S West Order* that operating income taxes and deferred operating income taxes be apportioned on book income. This procedure appears to be equitable and easy to apply.[175] Upon further review of this area, however, we will not mandate a further modification of U S West's procedure for apportioning deferred operating taxes in part on investment. However, we adhere to our belief that use of investment-based apportionments for the income tax accounts is not proper. U S West's proposal to differentiate between property-related and nonproperty-related costs is not required for a fair apportionment of income taxes, and in fact may apportion excessive income taxes to regulated operations. Accordingly, U S West must as directed in the *U S West Order* apportion its total taxes for the period on the basis of specifically defined book income. Any difference between the total tax apportioned based on book income and the deferred taxes in Account 7250 as proposed in the revisions shall be reported in Accounts 7220 and 7230, as appropriate, so that the total of individual Accounts 7220, 7230 and 7250 equals the total tax apportioned based on specifically defined book income.

III. ORDERING CLAUSES

101. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communication's Act of 1934, as amended, 47 U.S.C. §154(i), that the March 21, June 30, and September 30, 1988 revisions to U S West's Cost Allocation Manual ARE APPROVED, subject to the conditions stated in this Order.

102. IT IS FURTHER ORDERED that the revisions required herein shall be filed no later than February 28, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, CC Docket 86-111, 2 FCC Rcd 1298 (1987)(*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283 (1987)(*Reconsideration Order*), *further recon.*, 3 FCC Rcd 6701 (1988)(*Further Reconsideration Order*), *petitions for review pending*, Southwestern Bell Tel. Corp. v. FCC, D.C. Circuit No. 87-1764 (filed Dec. 14, 1987); National Tel. Cooperative Ass'n v. FCC, D.C. Circuit No. 87-1771 (filed Dec. 15, 1987).

[2] The three U S West telephone operating companies are the Mountain States Telephone and Telegraph Company (Mountain States), Northwestern Bell Telephone Company (Northwestern Bell), and Pacific Northwest Bell Telephone Company (Pacific Northwest). The immediate corporate parent of these companies is now U S West Communications.

[3] U S West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 195 (1988)(*U S West Order*).

[4] *Id.* at 195-96, paras. 3, 7-10; *id.* at 210, paras. 136-37.

[5] Letter from Margaret F. Tumey, Director, Federal Relations, U S West, to H. Walker Feaster III, Acting Secretary, Federal Communications Commission (June 30, 1988).

[6] U S West also filed revisions on December 1, 1988. These revisions are the subject of a separate public notice and are not addressed in this Order.

[7] U S West may consolidate its March 31, 1989 quarterly update, if any, with this filing.

[8] *U S West Order*, 3 FCC Rcd at 195, para. 3.

[9] With regard to those revisions that U S West claims it cannot make retroactively, we reserve the right to require either retroactivity or subsequent adjustments to reflect the impact of the lack of retroactivity on 1988 operations.

[10] *U S West Order*, 3 FCC Rcd at 195-96, paras. 3, 9-10; *see also Joint Cost Order*, 2 FCC Rcd at 1317-19, paras. 147-64.

[11] *U S West Order*, 3 FCC Rcd at 195-96, paras. 5-10.

[12] MCI Comments at 1-5.

[13] *Id.* at 5-8.

[14] U S West Reply at 27-30.

[15] *U S West Order*, 3 FCC Rcd at 195-96, paras. 5-10.

[16] *See Reconsideration Order*, 2 FCC Rcd at 6305, para. 191.

[17] *See Joint Cost Order*, 2 FCC Rcd at 1355, n.390; *accord Reconsideration Order*, 2 FCC Rcd at 6305, para. 191.

[18] *U S West Order*, 3 FCC Rcd at 201, para. 50; *id.* at 202, para. 59.

[19] Although we do not enumerate each deficiency in U S West's descriptions of its studies, reviews, and analyses, one example should illustrate why we find those descriptions inadequate. In its revisions, U S West states that it maintains a company subaccount for customer services operations within Account 6623 - Customer services. U S West's description of how it will subdivide this subaccount into "Regulated," "Nonregulated," and "Common" cost pools consists of the following statement: "Th[ese] cost pool[s are] formed by a semi-annual detailed time study." U S West Revised Manual at p. 6-65.

[20] We note that while U S West intends to update many of its analyses, reviews, and studies semi-annually, it should also update them whenever a change in procedures or new transactions might significantly affect apportionment results.

[21] *Compare Joint Cost Order*, 2 FCC Rcd at 1355, n.390 (level of detail is comparable to that in Separations Manual, not that in the former Division of Revenues procedures).

[22] *See id.* at 1333, para. 274.

[23] *Id.* at 1329, para. 242; *id.* at 1334, para. 283.

[24] *See id.* at 1333, para. 274.

[25] *U S West Order*, 3 FCC Rcd at 197, paras. 14-15.

[26] U S West Revised Manual at pp. 2-5 to 2-6, *citing* Applied Spectrum Technologies, Inc., Petition for Declaratory Ruling Under Section 64.702 of the Commission's Rules Regarding the Status of "Spread Spectrum" Transmission Services, ENF 85-6, Mimeo No. 5532 (released July 3, 1985) (*AST Order*) *and* Mountain States Telephone and Telegraph Company, Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations to Provide Spread Spectrum Alarm Services, AAD 6-1104, Mimeo No. 3515 (released Apr. 2, 1986) (*Mountain States Order*).

[27] U S West Revised Manual at pp. 2-5 to 2-6.

[28] Colorado PUC Comments at 3-4; Joint State Comments at 4-6.

[29] *Id.* at 5-6.

[30] U S West Reply at 4-8.

[31] *Id.* at 6 n.12.

[32] *Id.* at 8.

[33] Southwestern Bell Telephone Co., Waiver of Section 64.702 of the Commission's Rules and Regulations to Provide Loop Status Verification Service, 3 FCC Rcd 4758 (1988)(*Loop Status Verification Service Order*).

[34] *See* U S West Revised Manual at p. 2-4 (definition of customer telecommunication services).

[35] *Loop Status Verification Service Order*, 3 FCC Rcd at 4759, para. 19.

[36] *Id.*, paras. 17-18.

[37] U S West Revised Manual at p. 2-4.

[38] Colorado PUC Comments at 2.

[39] U S West Reply at 8 n.17.

[40] *See generally* NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 5978, 5979, para. 16 (1988)(*NYNEX Compliance Order*).

[41] U S West Revised Manual at p. 2-5.

[42] U S West Initial Manual at 11-17.

[43] *U S West Order*, 3 FCC Rcd at 198-99, paras. 24-38.

[44] In addition to the matters we discuss in the following paragraphs, U S West shall also state in its further revisions the standards and procedures it employs in calculating the fully distributed costs of affiliate transactions. *See* 47 C.F.R. §§32.27(d), 64.901(b).

[45] U S West Revised Manual at pp. 5-3 to 5-19.

[46] Joint State Comments at 7-8, *citing* 47 C.F.R. §31.01-11(d). We note that the cited rule, which applies to service transactions occurring prior to January 1, 1988, is virtually identical to Section 32.27(d) of the Commission's Rules, 47 C.F.R. 32.27(d), which applies to service transactions occurring after that date.

[47] Joint State Comments at 9-11.

[48] *Id.*

[49] U S West Reply at 11, *citing U S West Order*, 3 FCC Rcd at 199, para. 33.

[50] U S West Reply at 9-13.

[51] *U S West Order*, 3 FCC Rcd at 199, para. 33, *citing* 47 C.F.R. §32.27(d).

[52] *U S West Order* at 198, para. 24; *id.* at 199, para. 33. This method mandates that the carrier determine the costs of the untariffed services "in a manner that complies with the standards and procedures for the apportionment of joint and common costs between the regulated and nonregulated operations in the carrier entity." 47 C.F.R. §32.27(d); *accord U S West Order*, 3 FCC Rcd at 198, para. 24.

[53] *See Joint Cost Order*, 2 FCC Rcd at 1336, para. 299; *U S West Order*, 3 FCC Rcd at 199, para. 33.

[54] U S West Initial Manual at 16.

[55] *Id.* at 13.

[56] *Id.* at 13, 16.

[57] *U S West Order*, 3 FCC Rcd at 199, paras. 33-34.

[58] U S West Revised Manual at p. 5-20.

[59] *Id.* at pp. 5-7 to 5-8.

[60] *Id.* at p. 5-7.

[61] *Id.*

[62] Joint State Comments at 11-15.

[63] U S West Reply at 13-16.

[64] *See Joint Cost Order*, 2 FCC Rcd at 1328, para. 240.

[65] *See, e.g.*, Amendment of Sections 64.702 of the Commission's Rules and Regulations, 104 FCC 2d 958, 1074-75 (1986)(*Computer III Phase I Order), recon.*, 2 FCC Rcd 3035 (1987), *further recon.*, 3 FCC Rcd 1135 (1988), *petitions for review pending*, People of the State of California v. FCC, D.C. Circuit No. 87-7230 (filed May 28, 1987).

[66] *Joint Cost Order*, 2 FCC Rcd at 1307-08, paras. 70-78; *id.* at 1350, n.149.

[67] *Id.* at 1310, para. 88; *see also* Detariffing the Installation and Maintenance of Inside Wiring, 2 FCC Rcd 349 (1986)(*Stay Denial Order*).

[68] *See* para. 36, *supra*.

[69] *Cf. U S West Order*, 3 FCC Rcd at 199, para. 33.

[70] If the Joint State Commenters are also concerned that the operating companies may obtain services from affiliates at prevailing market prices that exceed the costs the operating companies would incur in providing the services themselves or obtaining the services from third parties, the remedy for such imprudency would lie in the ratemaking, not the cost allocation manual, process.

[71] U S West Revised Manual at p. 5-22.

[72] *Id.*

[73] *U S West Order*, 3 FCC Rcd at 199, para. 34.

[74] *NYNEX Compliance Order*, 3 FCC Rcd at 5980, para. 20.

[75] *Id., quoting* 47 C.F.R. §32.27(d).

[76] *U S West Order*, 3 FCC Rcd at 199, para. 34; *see* 47 C.F.R. §32.27(d).

[77] Although we will not prejudge any showing U S West might make to obtain such a waiver, we note that the showing should be sufficient to establish that a departure from the fully distributed cost requirement would not harm ratepayers. The carrier may demonstrate absence of harm if, for example, the price the carrier pays third parties is lower than the nonregulated affiliate's fully distributed costs. Even if the price the carrier pays third parties exceeds the nonregulated affiliate's fully distributed costs, ratepayers might be protected if the carrier were to obtain more of an identical service from third parties than from its nonregulated affiliate.

[78] U S West Revised Manual at p. 5-22.

[79] *Id.* at p. 3-5 (software sales to be treated as an incidental activity).

[80] Colorado PUC Comments at 4.

[81] *U S West Order*, 3 FCC Rcd 201-02, paras. 51-58.

[82] U S West Revised Manual at pp. 6-3 to 6-4.

[83] *Id.* at p. 5-17.

[84] U S West June 30 Revisions at p. 2-5.

[85] *Id.*

[86] *Id.*

[87] *See U S West Order*, 3 FCC Rcd at 203-04, paras. 71-76.

[88] *See North American Telecommunications Ass'n*, 3 FCC Rcd 4385, 4392, para. 50 (1988) *(NATA/Centrex Reconsideration Order)*.

[89] U S West Revised Manual at p. 6-47.

[90] *Joint Cost Order*, 2 FCC Rcd at 1320, para. 173; *see also* Nevada Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs and Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 287, 295, para. 76 *(1988)(Nevada and Pacific Order)*.

[91] U S West Revised Manual at pp. 6-48 to 6-48A. While we have no objection to U S West's usage measurements at this time, we intend to monitor the effect of all aspects of the apportionment methods that U S West proposes for its enhanced services, and revisit those methods in the event they produce inaccurate results. *See* Ameritech Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 433, 440, para. 59 *(1988)(Ameritech Order)*.

[92] Calculating apportionment factors using apportionment results for the prior month, as U S West proposes for many of its expense accounts, appears to be sufficient to constitute apportionment based on current usage.

[93] *Joint Cost Order*, 2 FCC Rcd at 1320, para. 173.

[94] Letter from Margaret F. Tumey, Director, Federal Relations, U S West, to H. Walker Feaster III, Acting Secretary, Federal Communications Commission, at 1 (Sept. 30, 1988).

[95] *E.g.*, U S West Revised Manual at p. 6-11.

[96] *U S West Order*, 3 FCC Rcd at 204, para. 80.

[97] *See U S West Revised Manual* at p. 6-7.

[98] *Id.* at p. 6-11.

[99] *Id.*

[100] *See* para. 14, *supra*.

[101] U S West Revised Manual at p. 6-10.

[102] *Id.* at p. 6-24.

[103] *See* Detariffing the Installation and Maintenance of Inside Wiring, 51 Fed. Reg. 8498, slip op. at 20, para. 43 (Mar. 12, 1986) *(Inside Wiring Detariffing Order), recon.*, 1 FCC Rcd 1190 (1986)*(Inside Wiring Reconsideration Order), further recon.*, 3 FCC Rcd 1719 (1988) *(Inside Wiring Further Reconsideration Order), petition for review pending, NARUC v. FCC*, D.C. Circuit Case No. 86-1687 (filed Dec. 11, 1986).

[104] *See* Nevada Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs and Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, FCC 88-1875, para. 74 (adopted Nov. 30, 1988) *(Nevada and Pacific Compliance Order)*.

[105] *U S West Order*, 3 FCC Rcd at 204, para. 82.

[106] U S West Revised Manual at p. 6-11.

[107] Joint State Comments at 17-18.

[108] U S West Reply at 18.

[109] U S West Initial Manual at 27.

[110] *U S West Order*, 3 FCC Rcd at 200-01, paras. 49-50.

[111] U S West Revised Manual at pp. 6-12 to 6-13, 6-18.

[112] *See* para. 14, *supra*.

[113] This method is similar to the methods we have approved for other carriers. *See, e.g.*, NYNEX Revised Manual at 75, *approved NYNEX Compliance Order*, 3 FCC Rcd at 5984, para. 59.

[114] U S West Initial Manual at 27; *see id.* at 21.

[115] *U S West Order*, 3 FCC Rcd at 202, para. 59.

[116] U S West Revised Manual at p. 6-19.

[117] *Id.* at pp. 6-14, 6-19.

[118] *See id.* at p. 6-7; *see also* para. 57, *supra*.

[119] *See, e.g., Inside Wiring Detariffing Order, supra* note 103, slip op. at 20, para. 44.

[120] U S West Initial Manual at 25.

[121] *U S West Order*, 3 FCC Rcd at 204-05, paras. 84-85.

[122] U S West March 21 Revisions at p. 6-15.

[123] *Id. (emphasis added)*.

[124] Joint State Comments at 18-19.

[125] U S West Reply at 20.

[126] Joint State Comments at 19.

[127] U S West Reply at 19.

[128] *U S West Order*, 3 FCC Rcd at 201, para. 49-50.

[129] U S West Revised Manual at p. 6-28.

[130] *See* para. 14, *supra*.

[131] *See* para. 64, *supra*.

[132] *U S West Order*, 3 FCC Rcd at 205, paras. 92-93.

[133] U S West Revised Manual at pp. 6-28 to 6-29.

[134] BellSouth Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 128, 135, para. 68 *(1988)(BellSouth Order); see also U S West Order*, 3 FCC Rcd at 205, para. 94.

[135] *Id.*

[136] U S West March 21 Revisions at p. 6-30.

[137] Joint State Comments at 20.

[138] U S West Reply at 21.

[139] U S West Revised Manual at p. 6-30.

[140] *See* para. 14, *supra*.

[141] *See U S West Order*, 3 FCC Rcd at 206, paras. 100-03.

[142] *Id.*, para. 104.

[143] U S West Revised Manual at p. 6-43.

[144] *Further Reconsideration Order*, 3 FCC Rcd at 6702 para. 12.

[145] *Id.* at 6709, n.10.

[146] U S West Initial Manual at 36.

[147] U S West Revised Manual at p. 6-30.

[148] *See* paras. 71-72, *supra*.

[149] *U S West Order*, 3 FCC Rcd at 202, para. 59.

[150] U S West Revised Manual at p. 6-55.

[151] *Id.*

[152] *See* para. 60, *supra*.

[153] *U S West Order*, 3 FCC Rcd at 207, paras. 110-12.

[154] *See* para. 14, *supra*.

[155] U S West Revised Manual at p. 6-65.

[156] *Id.*

[157] *Id.* at p. 6-66.

[158] *Id.*

[159] U S West March 21 Revisions at p. 6-68.

[160] *Id.*

[161] *Id.* at p. 6-73.

[162] *Id.*

[163] Joint State Comments at 21-22.

[164] U S West Reply at 23.

[165] U S West Revised Manual at p. 6-68.

[166] Thus, while the factors themselves might not be circular, any reasoning that might support them would be circular.

[167] Joint State Comments at 23.

[168] U S West Reply at 23-24.

[169] U S West Initial Manual at 49.

[170] *U S West Order*, 3 FCC Rcd at 208, para. 115.

[171] U S West Revised Manual at p. 6-81.

[172] Joint State Comments at 24.

[173] U S West Reply at 24-25.

[174] *U S West Order*, 3 FCC Rcd at 209, para. 130.

[175] *See, e.g.*, NYNEX Revised Manual at 146, *approved NYNEX Compliance Order*, 3 FCC Rcd at 5984, para. 59.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs — AAD 7-1671

MEMORANDUM OPINION AND ORDER

Adopted: December 28, 1988; Released: January 9, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In the *Joint Cost Order*,[1] the Commission required certain subject carriers, including the Bell Atlantic Telephone Companies (Bell Atlantic),[2] to file manuals for separating the costs of regulated telecommunications services from the costs of nonregulated activities. In response to this requirement, Bell Atlantic filed a cost allocation manual on August 10, 1987. That manual described Bell Atlantic's nonregulated activities, listed the activities Bell Atlantic proposed to treat as incidental activities, and provided information on Bell Atlantic's affiliate transactions, employee time reporting procedures, and cost apportionment methods.

2. We reviewed that manual in the *Bell Atlantic Order*,[3] and found that certain areas of the manual required clarification or revision. Despite these problem areas, we conditionally approved Bell Atlantic's manual. We determined that the manual provided adequate assurances against the misallocation of costs and revenues between regulated and nonregulated activities to permit its implementation on January 1, 1988. We required, however, that Bell Atlantic submit revisions addressing each of the specified problem areas. We stated that these revisions would be subject to public comment and our review, and that we would take all appropriate action, including the prescription of specific apportionment procedures, in the event we disapproved any part of the revisions.[4]

3. Bell Atlantic submitted its revisions on March 14, 1988, and further revised its manual on June 30, 1988, and on September 30, 1988. The March 14 revisions provide additional information regarding the problem areas identified in the *Bell Atlantic Order* and, according to Bell Atlantic, comply fully with that Order.[5] The Public Service Commission of the District of Columbia (D.C. Commission), the Maryland People's Counsel (Maryland), and MCI Telecommunications Corporation (MCI) commented on the March 14 revisions; and Bell Atlantic replied. The June 30 revisions add the provision of "CO-LAN extended interface units" and gateway services as nonregulated activities, amend the affiliate transactions section of the manual, and change Bell Atlantic's apportionment methods for a number of accounts. No party commented on these revisions. The September 30 revisions add coin message delivery service, customer dialed account recording, and voice messaging services as nonregulated activities, amend the affiliate transaction section, and further revise Bell Atlantic's apportionment methods. The D.C. Commission commented on these revisions, and Bell Atlantic replied.

4. After reviewing the pleadings and the contents of Bell Atlantic's revisions, we find, subject to certain exceptions, that they are consistent with the Commission's requirements for cost allocation and properly implement the *Bell Atlantic Order*. Before turning to these exceptions, we wish to emphasize that this Order does not discuss many areas in which Bell Atlantic has complied fully with Commission requirements and with the *Bell Atlantic Order*. We also wish to emphasize that the exceptions are very limited in relation to the manual as a whole. Accordingly, we approve Bell Atlantic's March 14, June 30, and September 30 revisions, subject to the filing of additional information and revisions specified herein. This filing shall be made no later than February 28, 1989.[6]

5. In the *Bell Atlantic Order*, we stated that Bell Atlantic would be required to make all revisions we approved or ordered effective as of January 1, 1988.[7] We recognize that such retroactivity may not be reasonably practicable with regard to certain additional changes we require in this Order. We direct Bell Atlantic to make such changes effective January 1, 1988 to the extent possible, and to identify in the transmittal to its filing which changes, if any, it cannot reasonably implement as of January 1, 1988, and the justification for not implementing changes retroactively.[8]

II. DISCUSSION

A. *Overall Sufficiency of the Revisions*

6. Under the *Joint Cost Order*, each cost allocation manual must describe the nonregulated activities, incidental activities, affiliate transactions, employee time reporting procedures, and cost apportionment methods of the telephone operating companies that will apply it. In the *Bell Atlantic Order*, we required Bell Atlantic to provide additional, and in certain instances, corrected, information regarding most of these areas. We were particularly concerned with the methods Bell Atlantic proposed for assigning costs to cost pools and for apportioning cost pools between regulated and nonregulated activities. We found those methods important because the costing system established in the *Joint Cost Order* requires telephone companies to divide the accounts and subaccounts listed in the Commission's Uniform System of Accounts (USOA) into homogeneous cost categories or pools that can be directly assigned to, directly or indirectly attributed to, or allocated between regulated and nonregulated activities on a cost causative basis.[9]

7. Although we ordered Bell Atlantic to provide additional information regarding its cost pool assignment and apportionment methods, we did not require Bell Atlantic to identify and justify the reporting codes, accounting record, and records of charges to accounts that support those methods. We determined, despite MCI's argument to the contrary, that such information would not be necessary for us to evaluate Bell Atlantic's overall apportionment system.[10]

8. In its March 14 revisions, Bell Atlantic provides extensive additional information regarding its cost pool assignment and apportionment methods. Maryland and

MCI contend that the additional information is insufficient. Maryland argues that the March 14 revisions fall far short of complying with our explicit directive that Bell Atlantic explain its cost pool assignment methods.[11] Maryland also contends that we should establish a mechanism for periodic public review of the cost allocation manual process. According to Maryland, such a mechanism is particularly important because pending Bell Atlantic proposals for the pricing of intrastate services in Maryland could effectively eliminate examination of the cost allocation process in that state.[12]

9. MCI maintains that although the additional information in the March 14 revisions makes the manual more "cosmetically helpful," many of Bell Atlantic's cost pool assignment and apportionment methods remain vague.[13] MCI argues that we must require Bell Atlantic to provide more thorough descriptions of its cost pool assignment and apportionment methods in order to evaluate the manual properly and that we should require that information at this time. MCI claims that Bell Atlantic's entire costing process continues to rely on the review and analyses of fundamental accounting records and reporting codes that the manual neither fully explains nor justifies. MCI contends that Bell Atlantic should be required to describe these records and codes more precisely, and to justify using them as the basis for apportioning costs between regulated and nonregulated activities.[14]

10. MCI argues further that we should clarify the procedures we intend to employ in auditing and overseeing the cost allocation manual process. In MCI's view, these procedures should make clear that telephone companies must make their fundamental cost data available to their independent auditors and to the Commission, and should specify how the Commission intends to review and test that data. In addition, MCI maintains that we should state the processes we will employ to review independent auditor reports and to obtain any relevant cost data that the independent auditors do not review.[15]

11. Both Maryland and Bell Atlantic respond to MCI's arguments. Maryland concurs with MCI's analysis of the March 14 revisions and contends that those revisions do not adequately explain Bell Atlantic's apportionment methods.[16] Bell Atlantic asserts that those revisions provide all the additional information that the *Bell Atlantic Order* required. Bell Atlantic argues that our Order was very specific in its requests for information and that MCI has identified no specific instance of noncompliance with that Order. Bell Atlantic maintains, in addition, that MCI's arguments regarding oversight of the independent auditor process lie outside the scope of this proceeding.[17]

12. We find that Bell Atlantic's March 14 revisions generally comply with the *Bell Atlantic Order*. In that Order, we declined to require Bell Atlantic to identify and justify the reporting codes, accounting records, and records of charges to accounts that support its cost pool assignment and apportionment methods. We found that requiring Bell Atlantic to describe those methods in greater detail would be sufficient to eliminate any ambiguities and deficiencies in the manual.[18]

13. Our review of the manual confirms that it now contains sufficient information for us to evaluate virtually all of Bell Atlantic's cost pool assignment and apportionment methods. We required additional information regarding those methods for two reasons. First, we wanted to ensure that the Commission, Bell Atlantic and the independent auditors would share a common understanding of the Bell Atlantic manual. We are satisfied that the revised manual achieves this purpose. A more detailed manual would not increase our ability or the independent auditors' ability to verify proper implementation of the manual.[19]

14. Our second reason for requiring additional information regarding Bell Atlantic's cost pool assignment and apportionment methods was to enable us to review the substantive merit of those methods that Bell Atlantic had not adequately explained. In virtually all instances, the revisions contain sufficient information to let us perform this review. As discussed below, we require additional information regarding a limited number of Bell Atlantic's cost pool assignment and apportionment methods. However, that information need not include the reporting codes, accounting records, analytical steps, and other procedures that Bell Atlantic has developed to implement its apportionment methods.[20] Accordingly, we reject Maryland's and MCI's requests that we require Bell Atlantic to provide an additional level of detail regarding its overall cost pool assignment and apportionment methods.

15. We agree with Maryland and MCI, however, that the data gathering procedures and documentation underlying the apportionment procedures set forth in the manuals are critical in any decision as to the reasonableness of the amounts assigned or allocated to nonregulated activities. However, that does not justify inclusion of such material in the manual to the extent that the resulting document is so cumbersome as to obscure its primary purpose -- the comprehensive description of how the carrier complies with the Commission's cost apportionment policies and rules.[21] It may well be that our audits or our review of the independent auditor reports will reveal problems not with the apportionment procedures themselves, but with the underlying data collection and recording procedures. If this is the case, we will require revisions in the apportionment results and, if necessary, disallow for ratemaking purposes those costs that have been improperly included in regulated accounts.

16. We also decline to specify the precise procedures we will employ in auditing and overseeing the cost allocation manual implementation process. While we intend to examine cost allocation and other accounting procedures in the course of our regular carrier audits and our review of independent auditor reports,[22] the procedures we will employ will be tailored to the circumstances we encounter. We emphasize, however, that telephone companies must retain a complete audit trail of all cost allocations and affiliate transactions, and must make that information as well as the independent audit and all related data and workpapers available to the Commission.[23] We will, of course, seek additional public comment where appropriate and require further changes to the manual in the event our own audits or our review of the independent auditor reports reveal a need for such action.[24]

B. ***Nonregulated Activities***

17. *Account Lists*. The *Joint Cost Order* required that each cost allocation manual describe the carrier's nonregulated activities, but did not require that the descriptions list the accounts affected by each particular nonregulated activity.[25] In its comments on Bell Atlantic's initial manual, Maryland requested that we impose such a requirement on Bell Atlantic. In the *Bell Atlantic Order*, we rejected that request. We indicated that cross referencing nonregulated activities to the accounts they affect

might facilitate review of Bell Atlantic's apportionment methods, but we stated that cross referencing was unnecessary in view of the limited number of nonregulated activities listed in the initial manual. We suggested, however, that we might require such a cross reference in the event Bell Atlantic were to add additional nonregulated activities in future revisions.[26]

18. In its comments on Bell Atlantic's March 14 revisions, Maryland reiterates its request that Bell Atlantic be required to cross reference its nonregulated activities to the accounts they affect. Maryland argues that Bell Atlantic's open network architecture (ONA) and comparably efficient interconnection (CEI) filings imply that it will be adding a variety of enhanced services to its list of nonregulated activities.[27] In reply, Bell Atlantic claims that cross referencing continues to be unnecessary.[28]

19. We do not believe that the list of nonregulated activities and accounts Maryland proposes would help us evaluate the subject revisions. Therefore, we will not require Bell Atlantic to provide such a list. With regard to future revisions, our experience indicates that such lists would not be a particularly useful tool for carriers to use in explaining proposed cost allocation manual revisions. Such lists are, at this juncture, a means for verifying that carriers consider the overall impact of proposed revisions before submitting them for our approval.[29] Our policy of approving only those revisions that are accompanied information sufficient to establish their consistency with Commission requirements[30] should ensure such consideration, and we believe that the information that should be provided must vary with the nature of the revision.[31]

20. *Yellow Pages*. In its manual, Bell Atlantic states that its operating companies publish "telephone directories," but does not indicate whether those directories include yellow pages.[32] Bell Atlantic must clarify this matter in its further revisions. If the operating companies publish yellow pages, the further revisions must also add that publication to Bell Atlantic's list of nonregulated activities.[33]

C. *Incidental Activities*

21. *Licensing of Intellectual Property Rights*. Bell Atlantic's initial manual proposed to treat "Licensing Fees" as a incidental activity and stated that this activity consists of the "[l]icensing or selling of intellectual property to third parties."[34] After Maryland challenged that proposal, we required Bell Atlantic to show that this activity meets the Commission's criteria for incidental treatment.[35] In its revisions, Bell Atlantic states, in an apparent attempt to show that its "Licensing Fees" activity is an outgrowth of regulated operations, that the properties being licensed or sold were developed and used by the operating companies "for internal purposes."[36]

22. We have no objection to Bell Atlantic's treating "Licensing Fees" as an incidental activity so long as it satisfies the four criteria set forth in the *Joint Cost Order*. We are concerned, however, that Bell Atlantic may intend to classify properties developed in the course of its nonregulated activities as outgrowths of regulated activities and to accord incidental treatment to the costs of those properties in connection with the licensing of the related intellectual property rights. Bell Atlantic's further revisions must state clearly that it will not do so.[37]

23. *Pole Attachments and Conduit Leasing*. In its initial manual, Bell Atlantic proposed to treat these activities as incidental activities. In the *Bell Atlantic Order*, we noted that the Commission had authorized the C&P to construct a cable system within the District of Columbia, and to lease cable space and pole attachments to the cable operator. We stated that, as a consequence of that authorization, Bell Atlantic's pole attachment and conduit leasing operations in the District of Columbia might not meet the Commission's criteria for incidental treatment. We required that Bell Atlantic provide additional information regarding those operations. We specified that, if those operations do not meet the criteria for incidental treatment, Bell Atlantic should provide separate treatment for C&P in the incidental activity, nonregulated activity, and cost apportionment sections of its manual.[38]

24. In its revisions, Bell Atlantic provides no specific information regarding C&P pole attachment and conduit leasing operations. Instead, Bell Atlantic states that its overall pole attachment and conduit leasing operations consist of:

> Leasing of available pole and conduit space to non-affiliated third parties pursuant to agreement. This service also includes determining whether or not space is available, inspecting each job to ensure the public's safety and making it available when necessary. Power companies and certain independent telephone companies have traditionally used this service, and the revenues received are recognized as rent revenues under the overall category of miscellaneous revenues. These services are not provided under tariffs and are not part of a line of business. In some jurisdictions, similar services are offered pursuant to tariff, e.g., certain conduit leasing in Bell of Pennsylvania, and are thus not included as incidental activities.[39]

These generalized statements do not comply with our requirement that Bell Atlantic provide additional information regarding C&P's pole attachment and conduit leasing operations. In its further revisions, Bell Atlantic must provide that information. Bell Atlantic's showing in this respect shall include, in addition to any other information Bell Atlantic deems relevant, detailed descriptions of the nature and scope of: (a) C&P's pole attachment and conduit leasing transactions with the District of Columbia cable operator and; (b) the local regulation, if any, of those transactions. Bell Atlantic shall also address why those transactions should not be considered part of a line of business.[40]

D. *Affiliate Transactions*

25. *Introduction*. In the *Bell Atlantic Order*, we found the affiliate transactions section of Bell Atlantic's initial manual deficient in a number of respects. We required that Bell Atlantic eliminate those deficiencies by including sufficient information in its revisions to enable us to determine whether Bell Atlantic is following the affiliate transaction rules.[41] We find that, in general, Bell Atlantic's revisions are adequate. There are, however, several issues that warrant discussion.

26. *Methodology for Determining Market Rates*. In its revisions, Bell Atlantic states that certain of its affiliate transactions involving the provision of services are provided at market rates. The manual defines market rate as "[t]he prevailing price held out to non-affiliated entities,"[42] but does not otherwise describe the methodology

Bell Atlantic will employ to determine those rates. The D.C. Commission and Maryland contend that the manual should describe that methodology. They assert the description is necessary to provide a mechanism for verifying that the rates being charged are market rates.[43] In reply, Bell Atlantic maintains that there is no requirement that the manual contain all the information necessary to determine whether market rates are appropriate. Bell Atlantic states that the auditing process, not the manual review process, is the appropriate forum for verifying carrier compliance with the procedures set forth in the manual.[44]

27. We agree that a cost allocation manual need not describe all the procedures the carrier will employ to determine market rates. However, as we stated in the *Bell Atlantic Order*, the manual must contain sufficient information to enable us to determine whether Bell Atlantic understands and is following the affiliate transaction rules.[45] Those rules mandate that services be recorded at market rates only when they are actually provided to unaffiliated persons or entities at those rates.[46] In contrast, Bell Atlantic's definition would allow an offer to provide services to establish a market price.[47] In its further revisions, Bell Atlantic must provide a definition of market rates that is consistent with the affiliate transaction rules.

28. To insure that Bell Atlantic's 1988 cost allocation results are accurate, we require it to review its transactions with affiliates during 1988 to determine whether it used an unaccepted offer to provide a service as the basis of costing any affiliate transaction at "market rate." Any such transaction must instead be costed at fully distributed costs.

29. *Provision of Services and Supplies.* In the *Joint Cost Order*, the Commission distinguished between the sale of assets and the provision of services and supplies in defining the terms to be applied to affiliate transactions.[48] In its revisions, Bell Atlantic proposes to treat "any item which would not be recorded in an investment account of the regulated carrier" as a service or supply.[49] Items which would be recorded in the carrier's investment account would be recorded as assets.[50] In apparent reliance on these definitions, Bell Atlantic classifies as services and supplies "computer and office supplies and accessories," "pocket pagers," "telecommunications supplies," and "telephone supplies" that nonregulated affiliates provide the operating companies.[51]

30. Bell Atlantic's further revisions shall clarify the nature of the transactions that it classifies as the provision of services and supplies in reliance on its definition of that term. If the nonregulated affiliates are providing the operating companies with purchasing services for items the operating companies obtain from third parties, Bell Atlantic may continue to list these transactions as services. If, however, the nonregulated affiliates are providing the operating companies with assets from the nonregulated affiliates' own inventories of such items, Bell Atlantic must list these transactions as asset transfers and specify terms that comply with the Commission's rules regarding such transfers.[52]

31. *Marketing of Paging Services.* Bell Atlantic's revisions state that Bell Atlantic Paging, Inc. (Bell Atlantic Paging) markets paging services for Bell of Pennsylvania, Diamond State and New Jersey Bell. Bell Atlantic proposes to record these transactions at "Competitive Rate[s]."[53] Bell Atlantic states that the Commission's affiliate transaction rules do not apply to these transactions because the costs are entirely assigned to the intrastate jurisdiction.[54]

32. Contrary to Bell Atlantic's position, there is no exception to the affiliate transaction rules for transactions whose costs are assigned entirely to the intrastate jurisdiction.[55] Therefore, we must determine whether those rules permit marketing services provided by a nonregulated affiliate to be recorded at "Competitive Rate[s]." Those rules require carriers to record such services at either the affiliate's fully distributed costs of providing the service or at the market rate established through transactions between the provider of the service and third parties. In its further revisions, Bell Atlantic must specify which of those methods it will use to record these marketing services.[56]

33. *Exchange Telecommunications and Access Services.* In its revisions, Bell Atlantic states that C&P provides exchange telecommunications and access services that are non-tariffed to Bell Atlantic Federal Systems, Inc. (Bell Atlantic Federal) on an "Individual Case Basis."[57] Bell Atlantic's further revisions must explain the nature of these services. In addition, the affiliate transaction rules require that operating companies record non-tariffed services either at their fully distributed costs or at market rates established through transactions between the operating companies and third parties.[58] In its further revisions, Bell Atlantic must either show that its proposed terms are consistent with those rules or specify terms that are consistent.

E. *Employee Time Reporting*

34. *Support Employees.* Bell Atlantic uses both positive and exception time reporting to record the time of employees that perform basic functions, but only exception time reporting to record the time of employees that perform support functions. In describing how it apportions the wages and salaries of support employees, Bell Atlantic states:

> Support Function - salary and wage expenses are normally applied as a loading onto Basic Functions that Positive Time Report. Support employees use Exception Time Reporting when working outside normally assigned functions.[59]

The D.C. Commission maintains that Bell Atlantic should be required to explain this methodology. The D.C. Commission states that it cannot determine from the manual why Bell Atlantic treats basic and support functions differently.[60]

35. In its response, Bell Atlantic provides the explanation the D.C. Commission requests.[61] Although somewhat unclear, that explanation indicates that Bell Atlantic loads support wages and salaries onto each of its basic functions when and only when a support employee whose normal job assignment is to support the basic function does not fill out an exception time report. All other support wages and salaries (other than those associated with nonproductive time) apparently are associated with the actual job functions performed in accordance with employee time reporting.[62] In its further revisions, Bell Atlantic shall either confirm this description of its procedures or state the respects in which it is incorrect.

36. *Nonproductive Time*. In its revisions, Bell Atlantic states that, subject to one exception, it will distribute nonproductive time to cost pools in the same proportion as productive time.[63] The exception is for that nonproductive time of exception time employees which cannot be associated with particular job assignments. That nonproductive time, according to the manual, is to follow the employees' normal job assignments.[64] We believe that all nonproductive time should be apportioned in the same proportion as productive time. Bell Atlantic shall provide for such an apportionment in its further revisions.[65]

F. *Enhanced Services*

37. *Introduction*. Bell Atlantic's initial manual included a series of apportionment proposals that were apparently intended to accommodate hypothetical nonregulated activities, *i.e.*, nonregulated activities that Bell Atlantic did not intend to provide during the three-year forecast period beginning January 1, 1988. In the *Bell Atlantic Order*, we required Bell Atlantic to eliminate these proposals from its manual.[66] We also required that Bell Atlantic change and provide additional information regarding those methods that it would retain. [67] We indicated that the additional information would help us evaluate whether Bell Atlantic's proposals for central office switching equipment are consistent with the Commission's requirements.[68] Bell Atlantic uses that equipment to provide a variety of regulated and enhanced services. Its apportionment proposals for that equipment's costs raise a number of issues warranting discussion.

38. *Nonregulated Usage of Central Office Equipment*. In its revisions, Bell Atlantic lists six enhanced services--customer dialed account recording (CDAR), protocol conversion, message storage service, gateway service, coin message delivery service, and voice messaging services--among its nonregulated activities.[69] Each of these enhanced services uses central office switching equipment on a nontariffed basis. To recognize that usage, Bell Atlantic has created a variety of shared cost pools within Accounts 2211 - Analog electronic switching, 2212 - Digital electronic switching, 6211 - Analog electronic expense, and 6212 - Digital electronic expense, as well as cost pools for direct assignment to nonregulated activities within Accounts 2212 and 6212.[70]

39. While Bell Atlantic's cost pool structure for these accounts appears adequate, the manual fails to make clear which enhanced services the individual cost pools support on a nontariffed basis. That failure has made review of Bell Atlantic's revisions unnecessarily difficult. Therefore, we require Bell Atlantic to state, in its further revisions, which enhanced services are supported on a nontariffed basis by each of its nonregulated and shared cost pools within Accounts 2211, 2212, 6211, and 6212.

40. *Direct Assignment of Analog Electronic and Electro - mechanical Switching Investment to Regulated Activities*. Bell Atlantic's initial manual proposed a series of cost pools within Account 2211 and Account 2215-Electromechanical switching, including cost pools that were to be directly assigned to nonregulated activities.[71] After we ordered Bell Atlantic to clarify various aspects of these of these proposals,[72] the company proposed in its March 14 revisions to assign Accounts 2211 and 2215 directly to regulated activities. Bell Atlantic stated that these accounts contained only regulated investment and that nonregulated usage of that investment would be provided at tariffed rates.[73] In its comments on these revisions, Maryland contended that we should reinstate the cost pools for direct assignment to nonregulated activities that the initial manual had proposed, unless Bell Atlantic were to state positively that it would not install any analog electronic or electro-mechanical switching equipment to be used exclusively for nonregulated services during the next three years.[74]

41. In its May 9 reply, Bell Atlantic stated that it did not have any nonregulated investment in Accounts 2211 and 2215, and that it had deleted the nonregulated cost pools from those accounts in accordance with our requirement that the manual not provide apportionment methods for hypothetical nonregulated activities. Bell Atlantic stated further that it would amend its manual to provide different apportionment methods for Accounts 2211 and 2215, if it were to install dedicated, nonregulated analog electronic or electro-mechanical switching equipment or if its three-year forecasts were to indicate shared usage of other analog electronic or electro-mechanical switching equipment.[75]

42. On July 21, 1988, the Commission ordered Bell Atlantic to detariff CDAR, an enhanced service that uses analog electronic switching equipment, and to file any cost allocation manual revisions that might be necessary to reflect that change in regulatory status.[76] Bell Atlantic filed its CDAR revisions on September 30. Those revisions propose to divide Account 2211 into two cost pools that would be directly assigned to regulated activities and a third pool, for "Common Control Equipment," that would be apportioned between regulated and nonregulated activities.[77] Bell Atlantic has not amended its proposals for Account 2215 since its March 14 revisions.

43. We approve Bell Atlantic's proposal to apportion its investment in analog electronic and electro-mechanical switching equipment between regulated and nonregulated activities only to the extent that it anticipates nontariffed, nonregulated usage of that equipment during the three-year planning period. That proposal is fully consistent with the *Bell Atlantic Order*. Moreover, Bell Atlantic has made clear that it anticipates no nontariffed, nonregulated usage of its analog electronic or electro-mechanical switching equipment (other than shared usage of certain equipment whose costs are recorded in Account 2211) during that planning period. Therefore, we reject Maryland's proposal that we require Bell Atlantic to include cost pools for direct assignment to nonregulated activities within Accounts 2211 and 2215.

44. *Study Methodologies*. As indicated previously, Bell Atlantic's September 30 revisions propose new apportionment methods to reflect the Commission's detariffing of CDAR.[78] Those methods affect Accounts 2212, 6211, and 6212 as well as Account 2211. In Accounts 2211 and 2212, the September 30 revisions add "Common Control Equipment" and "Network Equipment" cost pools. Bell Atlantic states that it assign costs to these pools in accordance with an annual central office equipment study.[79] The only information the manual provides regarding this study's methodology is that it will be performed "by Study Area."[80] Bell Atlantic's description of this study is insufficient. In its further revisions, Bell Atlantic shall describe this study in sufficient detail to enable us to evaluate the study's methodology.[81]

45. Bell Atlantic proposes to apportion its "Common Control Equipment" cost pools in proportion to "Forecasted Weighted Calls."[82] Bell Atlantic indicates that it forecasts call attempts "by Study Area" and conducts an

annual study to determine weighting factors to be applied to the forecast results. This study, according to the manual, "calculates the percentage of a call that is regulated and the percentage that is nonregulated based on the common control resources that must be applied to the calls."[83] This description is also inadequate and must be expanded in Bell Atlantic's further revisions. Those revisions shall state, in addition to any other information that Bell Atlantic might require to complete its description of this study, the means by which Bell Atlantic intends to determine the relative common control resources that are applied to regulated and nonregulated calls.[84]

46. *Network Equipment Cost Pools.* As indicated previously, Bell Atlantic's September 30 revisions created "Network Equipment" cost pools within Accounts 2211 and 2212.[85] Bell Atlantic proposes to assign these pools directly to regulated activities. Bell Atlantic states that the equipment whose costs are assigned to these pools "provides the terminations within the switch and supports the common control equipment."[86] Bell Atlantic states further that this network equipment "also performs a variety of functions (i.e., scanning, supervision, testing, etc.) within the switch."[87]

47. In its comments on the September 30 revisions, the D.C. Commission contends that Bell Atlantic has failed to explain why the costs of network equipment that supports nonregulated common control equipment is being directly assigned to regulated activities. The D.C. Commission maintains that we should require Bell Atlantic to apportion part of these pools to nonregulated activities.[88] In reply, Bell Atlantic states that the D.C. Commission's position reflects a misinterpretation of the manual, that the equipment in the "Network Equipment" cost pools is used solely to provide regulated services, and that the costs of that equipment is recovered through tariffed rates.[89]

48. As the D.C. Commission suggests, Bell Atlantic's September 30 revisions imply that the equipment in these "Network Equipment" pools supports common control equipment that performs nonregulated functions. Because of this implication, Bell Atlantic's subsequent statement that this "Network Equipment" provides only regulated services is puzzling. In its further revisions, Bell Atlantic must clarify this matter. If this "Network Equipment" supports common control equipment that provides nonregulated services on a nontariffed basis, Bell Atlantic must apportion part of these "Network Equipment" pools to nonregulated activities. If this "Network Equipment" supports common control equipment that provides only regulated services, Bell Atlantic shall state so in its further revisions and may continue to assign these pools directly to regulated activities.

49. *Common Analog and Digital Electronic Expenses.* Bell Atlantic's revisions include "Common" cost pools within Account 6211 and 6212 for expenses incurred to maintain analog and digital electronic switching equipment. Bell Atlantic states that these pools are to be apportioned, "for the next period, to the regulated and nonregulated operations based on the respective ratios of regulated and nonregulated actual use to total actual use as adjusted for weighted call attempts."[90] The references to "the next period" imply that Bell Atlantic may be intending to employ usage results for one period to apportion maintenance expenses for the current period. Any such procedure might be inconsistent with the Commission's requirement that such expenses be apportioned on the basis of current relative regulated/nonregulated usage.[91] In its further revisions, Bell Atlantic must either state that it intends to comply with that requirement or show why a waiver of that requirement might be appropriate.[92]

50. Bell Atlantic proposes to apportion its "Common" cost pool within Account 6211 in proportion to "Current Relative Use - Acct. 2211 - Related Shared Network Investment Cost Pools."[93] Since the revisions list only one shared investment cost pool within Account 2211 and since that pool is being apportioned in proportion to "Forecasted Weighted Calls,"[94] it appears that Bell Atlantic intends to count call attempts involving nonregulated analog electronic processing and other call attempts involving analog electronic processing to measure current usage of its common analog electronic switching equipment.[95] We are concerned, however, that the manual does not state that call attempts will be counted in this manner. Therefore, in addition to explaining the weighting process for call attempts,[96] Bell Atlantic's further revisions shall either provide such a statement or explain in detail how Bell Atlantic intends to measure current usage of this equipment.

51. The apportionment factor Bell Atlantic proposes for its "Common" cost pool within Account 6212 is "Current Relative Use - Acct. 2212 - Related Shared Network Investment Cost Pools."[97] That factor references two shared investment cost pools in Account 2212. Since one of those pools is being apportioned in proportion to "Forecasted Weighted Calls" and the other is being apportioned in proportion to "Forecasted Switched Segments,"[98] it appears that Bell Atlantic intends to count both call attempts and switched segments to measure usage of its common digital electronic switching equipment. The revisions, however, neither state that call attempt counts and switched segment counts will be employed nor explain how Bell Atlantic intends to combine these separate usage measurements into a single apportionment factor. In its further revisions, Bell Atlantic shall describe in detail how it intends to apportion this cost pool. If Bell Atlantic intends to retain a single cost pool for these expenses, the revisions must explain how Bell Atlantic proposes to combine the two usage measurements into a single apportionment factor. If Bell Atlantic intends to disaggregate this cost pool into separate cost pools corresponding to its two shared cost pools within Account 2212 and then apply individual usage measurements to the respective cost pools, it shall list the separate cost pools and make clear the basis on which they are to be apportioned.[99]

G. *Apportionment Proposals*

52. *Terminology.* In its initial manual and its revisions, Bell Atlantic uses the term "class of plant" to describe its apportionment methods. The D.C. Commission argues that it is unclear whether this term refers to Part 32 plant accounts, as opposed to both those accounts and to the company subaccounts that Bell Atlantic uses to establish cost pools.[100] The D.C. Commission maintains that Bell Atlantic should be required to clarify this term. To illustrate the need for clarity, the D.C. Commission references apportionment proposals for depreciation expenses and for Account 7250 - Provision for deferred operating income taxes-net.[101] Bell Atlantic's reply addresses this term only in relation to Account 7250. Bell Atlantic indicates that, as used in that account, the term refers to the Part 32 plant accounts that gave rise to deferred operating income taxes.[102]

53. We would find the definition stated in Bell Atlantic's reply satisfactory, if it were stated in the manual and applied consistently throughout the manual. However, in its September 30 revisions, Bell Atlantic proposes to add "Shared Use" cost pools to Accounts 2690 - Intangibles, 3100 - Accumulated depreciation, and Account 6561 - Depreciation expense-telecommunications plant in service. These cost pools are, according to Bell Atlantic, to be created "[b]y Class of Plant," even though their titles imply that they are to include only investment in shared plant.[103] We can only conclude that Bell Atlantic employees use "class of plant" to refer to cost pools and company subaccounts as well as to Part 32 accounts. To avoid future confusion regarding the meaning of this term, we require that Bell Atlantic eliminate it from the manual.

54. *Equal Access Cost Pools.* In its June 30 revisions, Bell Atlantic adds "Equal Access and Network Reconfiguration" cost pools to Accounts 6124 - General purpose computer expense, 6535 - Engineering expense, 6561 - Depreciation expense-telecommunications plant in service, and 6724 - Information management. These cost pools are properly being directly assigned to regulated activities. However, each of the subject accounts includes a common cost pool that is being apportioned between regulated and nonregulated activities in proportion to relative investment that includes investment in equal access and network reconfiguration equipment.[104] We believe that these apportionment factors, in combination with the direct assignment to regulated activities of the equal access and network reconfiguration cost pools within these accounts, will result in an overapportionment of costs to regulated activities. Accordingly, we require Bell Atlantic to amend its manual to specify that equal access and network reconfiguration costs will be excluded from the calculation of the apportionment factors from the common cost pools within these accounts.[105]

H. ***Specific Accounts***

Account 1439 - Deferred Charges and Account 4120 - Other Accrued Liabilities

55. In its initial manual, Bell Atlantic failed to propose any apportionment methods for these accounts. In the *Bell Atlantic Order*, we directed Bell Atlantic to remedy these omissions.[106] We also required that Bell Atlantic establish cost pools for deferred charges related to compensated absences and for liabilities related to compensated absences within Accounts 1439 and 4120, respectively.[107] Bell Atlantic's revisions include such cost pools and propose that they be directly assigned to regulated activities.[108] These direct assignments are improper because the obligations reflected in these cost pools arose in part in connection with the planning, development, and actual provision of nonregulated products and services by Bell Atlantic. We believe that Bell Atlantic should reflect the source of those obligations by using the relative apportionment of its current total wages and salaries to apportion these cost pools. It shall do so in its further revisions.[109]

56. The revisions also propose an "Other Deferred Charges" cost pool within Account 1439 that would be apportioned using the general allocator.[110] Maryland contends that Bell Atlantic should isolate deferred charges relating to contemplated construction projects and property acquisitions from this cost pool, and directly assign them to regulated or nonregulated activities on a case-by-case basis.[111] Bell Atlantic replies that the costs in this cost pool are excluded from the interstate rate base. Bell Atlantic also states that only minimal costs are assigned to this pool and that those costs will be transferred to other accounts as specific projects are approved. Therefore, Bell Atlantic contends, it is unnecessary to develop more elaborate apportionment methods for this cost pool.[112]

57. We originally required Bell Atlantic to include an apportionment proposal for Account 1439 in its manual because we thought that an apportionment would be necessary to produce correct rate base computations.[113] Bell Atlantic, however, correctly states that costs of the kind recorded in its "Other Deferred Charges" cost pool in Account 1439 are currently excluded from the interstate rate base.[114] In view of that exclusion, we eliminate our requirement that Bell Atlantic apportion these costs in its manual.

Account 2113 - Aircraft

58. In its initial manual, Bell Atlantic proposed to apply the general allocator to this entire account.[115] In the *Bell Atlantic Order*, we required Bell Atlantic to develop a better apportionment method for aircraft investment, and we suggested that it might be possible to base that method on specific records or flight logs.[116] Bell Atlantic's revisions propose a single cost pool, to be apportioned in proportion to relative regulated and nonregulated expenses in Account 6711 - Executive.[117]

59. Maryland comments that this revision is not an improvement. Maryland urges that Bell Atlantic be required to maintain records disclosing the business purpose of each of its flights and to apportion this account on the basis of such records.[118] Bell Atlantic replies that its existing flight records do not contain sufficient information to track regulated and nonregulated airplane usage, that its airplanes are rarely used for exclusively regulated or nonregulated purposes, and that some apportionment factor will therefore be necessary for this account.[119] Bell Atlantic maintains that corporate officers and executives whose expenses are recorded in Account 6711 are generally the only Bell Atlantic personnel who use aircraft and that relative executive expenses is "the most cost-causative allocation factor" for this account.[120]

60. In view of Bell Atlantic's representations regarding the purposes of its flights and the personnel who use those flights, we conclude that Bell Atlantic maintains its aircraft to support persons whose expenses are recorded in Account 6711. As a consequence, we would approve any apportionment proposal for aircraft investment that was based on a reasonable apportionment of Account 6711. As discussed below, however, we believe that Bell Atlantic's proposed apportionment factor for Account 6711--total wages and salaries--is not cost causative and must be revised.[121] With that proviso we approve Bell Atlantic's proposal for apportioning aircraft investment.

Account 2111 - Land and Account 2121 - Buildings

61. Bell Atlantic's initial manual proposed to divide Account 2121 into a series of cost pools, but did not describe the procedures that would be used to assign costs to those pools.[122] In the *Bell Atlantic Order*, we ordered Bell Atlantic to describe those procedures.[123] In its revisions, Bell Atlantic states that it will employ a buildings study to assign building investment to cost pools.[124] According to the revisions, this study will entail an annual

analysis of the square feet of floor space assigned to each cost pool. Bell Atlantic states that it develops a cost per square foot "for each building and its associated land," and applies that cost to the space assigned to each cost pool.[125] Bell Atlantic also states that the "investment is then summarized to a Study Area total and distribution ratios calculated."[126]

62. We believe that Bell Atlantic needs to clarify the interplay between this study and its apportionment method for Account 2111. Bell Atlantic's statement that it develops square footage costs for both land and buildings implies that Bell Atlantic could use the results of this study to assign its land investment to cost pools. However, in both its initial and revised manuals, Bell Atlantic states that it uses relative building investment to apportion land investment.[127] It is not clear how the combination of this method and Bell Atlantic's practice of using square footage costs that reflect land usage to assign its building investment to cost pools might produce an accurate apportionment of land and building investment between regulated and nonregulated activities. In its further revisions, Bell Atlantic shall either show how such an apportionment will result or propose more straightforward apportionment methods for these accounts."[128]

Account 2681 - Capital Leases

63. In its initial manual, Bell Atlantic proposed to use an analysis of leased properties to apportion its capital lease investment between regulated and nonregulated activities. Since that proposal assumed that all capital leases can be associated with an exclusively regulated or exclusively nonregulated function, we ordered Bell Atlantic to isolate its capital leases that reflect joint use by regulated and nonregulated activities, classify those leases by related USOA accounts, and then apportion the investment in each capital lease classification "using the methodology in the related USOA account"[129] Although Bell Atlantic has generally complied with these requirements, it has not described its cost pool assignment methods for investment in leased land and buildings in sufficient detail for us to confirm that those methods include a study similar to that employed for investment in owned land and buildings.[130] Bell Atlantic shall do so in its further revisions.

Account 3100 - Accumulated Depreciation and Account 6561 - Depreciation Expense - Telecommunications Plant in Service

64. Bell Atlantic's initial manual proposed apportionment methods for these accounts that were inconsistent with the Commission's determination in the *Joint Cost Order* that depreciation reserve amounts should be apportioned at the level of specificity maintained for investment accounts. [131] In Account 3100, the inconsistency arose from Bell Atlantic's lumping shared use investment into two cost pools that would be apportioned using the "Relative Investment Value" of certain investment cost pools and accounts.[132] In Account 6561, the inconsistency arose from Bell Atlantic's proposal to apportion the entire account based on the "Relative Investment Value" of its network plant accounts.[133] We ordered Bell Atlantic to eliminate these inconsistencies,[134] and we specified that depreciation expense apportionments should "follow[] the investment accounts on an account-by-account basis."[135]

65. In its revisions, Bell Atlantic proposes "Shared Use - Central Office Equipment" and "Shared Use - Other" cost pools within each of these accounts. These cost pools would be created, "[b]y Class of Plant," and would be apportioned using "Relative Investment - Related Shared Network Investment Cost Pools" and "Relative Investment - Accts. 2112 through 2124," respectively.[136] Because they are based on relative investment in more than one account, these apportionment factors are inconsistent with our requirement that Bell Atlantic's depreciation expense apportionments should follow investment accounts on an account-by-account basis.

66. We have already required Bell Atlantic to eliminate the term "[b]y Class of Plant" from its manual.[137] When it does so, Bell Atlantic shall list within its cost table each cost pool that it intends to create within these accounts. Beside each such cost pool, Bell Atlantic shall list the corresponding investment account cost pool or pools. For each such cost pool, Bell Atlantic shall propose an apportionment method that reflects the relative apportionment of the corresponding investment cost pool or pools.

Account 5040 - Local Private Line Revenue, Account 5264 - Other Incidental Revenue, and Account 7991 - Other Nonregulated Revenues

67. Because Bell Atlantic's initial manual did not include apportionment procedures for these accounts, we required Bell Atlantic to incorporate such procedures into its manual.[138] In its March 14 revisions, Bell Atlantic proposes to use company subaccounts to divide each of these accounts into two pools, to be directly assigned to regulated and nonregulated activities, respectively.[139]

68. Maryland objects to these proposals. Maryland maintains that the treatment of Account 5040 is inconsistent with Bell Atlantic's proposal to assign its cable and wire expense (Accounts 6411 to 6441) directly to regulated activities. Maryland argues that this inconsistency must be resolved either by deleting the nonregulated pool from Account 5040 or by adding nonregulated cost pools to each of the cable and wire accounts.[140] Maryland contends that Bell Atlantic's proposal for Account 5264 raises a similar problem, because Bell Atlantic is assigning Account 6232 - Circuit equipment expense - directly to regulated activities.[141]

69. Bell Atlantic replies that its treatment of these accounts is appropriate. Bell Atlantic states that it received permission to record nonregulated revenue in unique subaccounts within Accounts 5040 and 5264, pending Commission action on its petition for further reconsideration of the *Joint Cost Order*. [142] Bell Atlantic indicates that it is these subaccounts that are being apportioned to nonregulated activities.[143]

70. In the *Reconsideration Order*, the Commission determined that when enhanced services include or utilize basic services that are provided at tariffed rates, carriers should account for the transactions as follows: first, the full amount of the combined regulated and nonregulated revenues shall be credited to Account 7991; and second, the tariffed portion shall be debited to Account 7991 and credited to the appropriate regulated revenue accounts in the 5000 series.[144] Bell Atlantic petitioned for reconsideration of this determination on the grounds that inclusion of operating revenues in a nonoperating account (*i.e.*, Account 7991) is contrary to generally accepted accounting principles.[145] Instead, Bell Atlantic claimed, carriers should be required to use the method which Bell Atlantic itself had been using. Bell Atlantic described this approach as follows:

> The tariffed portion of any nonregulated activity is credited to the proper operating revenue account, through the use of Universal Service Order Codes (USOCs), when customers are billed. The difference between the amount of the total billing and the tariffed portion is credited to the proper operating revenue account through the same process. Accordingly, the revenues are appropriately reported and no further journalization or reclassification is necessary.[146]

71. On February 25, 1988, Bell Atlantic requested our permission to continue using its own method pending action on its petition for reconsideration.[147] In the *Revenue Accounting Letter*, the Accounting and Audits Division granted that request on an interim basis, pending action on the petition for reconsideration. The grant allows Bell Atlantic to maintain company subaccounts within Accounts 5040 and 5264 for revenues that it would otherwise be recording in Account 7991 and apportioning to nonregulated activities. Bell Atlantic is correct in assigning those subaccounts directly to nonregulated activities. Moreover, despite Bell Atlantic's unique accounting practices, its nonregulated operations obtain usage of cable and wire facilities and circuit equipment only at tariffed rates.[148] Therefore, Bell Atlantic's assignment of its nonregulated subaccounts directly to nonregulated activities does not imply that any portion of the costs of those facilities and equipment should be apportioned to nonregulated activities.

72. In the *Further Reconsideration Order*, the Commission addressed Bell Atlantic's petition in this regard. The Commission determined that nonregulated revenues should not be recorded in a nonoperating account, as the *Reconsideration Order* had required, or be spread among the various nonregulated revenue accounts, as Bell Atlantic had proposed. The Commission instead required carriers to record these revenues in a single operating revenue account.[149] To implement that determination, the Commission deleted Account 7991 and added Account 5280 - Nonregulated operating revenue.[150] Those rule changes will become effective on May 22, 1989.

73. We will not require Bell Atlantic Bell Atlantic to change its revenue accounting practices prior to that effective date. However, in the *Further Reconsideration Order*, the Commission also determined that it is essential to our monitoring efforts that cost manuals list any account in which carriers record revenues derived from nonregulated activities to which the manual apportions costs.[151] In accordance with that determination, Bell Atlantic must revise its manual to list Account 5280 prior to May 22, 1989.

Account 5301 - Uncollectible Revenue - Telecommunications and Account 5302 - Uncollectible Revenue - Other

74. In its initial manual, Bell Atlantic proposed to apportion these accounts based on gross revenues. In the *Bell Atlantic Order*, we disapproved those proposals. We stated that uncollectible revenue should be apportioned in proportion to the apportionment of the corresponding revenue and, in particular, that telecommunications revenue must form the basis for apportioning telecommunications uncollectibles.[152]

75. In its revisions, Bell Atlantic indicates that it maintains company subaccounts for regulated and for nonregulated uncollectibles within Accounts 5301 and 5302. The manual, however, does not describe the criteria it employs to divide its uncollectibles among these subaccounts.[153] It is essential that the manual specify those criteria. Therefore, we require that Bell Atlantic specify those criteria in its further revisions. Those criteria shall make clear that Bell Atlantic apportions uncollectible revenue related to telecommunications activities in proportion to relative telecommunications revenue and uncollectible revenue related to non-telecommunications activities in proportion to relative non-telecommunications revenue.[154]

Account 6121 - Land and Building Expense

76. In the *Bell Atlantic Order*, we required Bell Atlantic to reformulate its proposals for this account. We stated that Bell Atlantic's revisions should include cost pools for regulated land and building expenses, for operating rents, and for shared expenses. We indicated that Bell Atlantic should apportion the latter cost pool in proportion to its relative investment in both owned and leased land and buildings.[155] In its revisions, Bell Atlantic proposes an apportionment method for this account that is similar to, but more precise than, the method we suggested. Although we generally approve Bell Atlantic's method, two of its aspects require clarification.

77. The first matter requiring clarification concerns Bell Atlantic's cost pools for "Regulated Land & Building Expense" and for "Shared Land & Building Expense - Owned." Bell Atlantic proposes to assign the first of these pools directly to regulated activities. The shared pool would be apportioned in proportion to Bell Atlantic's relative investment in owned buildings.[156] While these proposals are consistent with the *Bell Atlantic Order*, we believe that they may result in an overallocation of costs to regulated activities. This would occur if the pools were to contain the same types of expense. In that event, apportioning the shared pool in proportion to Bell Atlantic's relative investment in owned buildings, including investment that the regulated pool in Account 6121 supports, would be improper.[157] In its further revisions, Bell Atlantic shall either show that these cost pools do not contain the same types of expense or propose an apportionment factor for the shared pool that eliminates the overapportionment of land and building expense to regulated activities.

78. The second matter requiring clarification concerns Bell Atlantic's treatment of operating rents. Bell Atlantic proposes to disaggregate those rents into a series of cost pools that correspond to the cost pools for investment in leased land and buildings it has created within Account 2681.[158] Bell Atlantic, however, has not described its methods for assigning costs to these pools within Account 6121 in sufficient detail for us to evaluate them.[159] It must do so in its further revisions.

Account 6611 - Product Management, Account 6612 - Sales, and Account 6613 - Product Advertising

79. Bell Atlantic proposes to apportion its "Residual Expense" cost pools in these accounts by its marketing allocator, which it describes as a single numerical factor which includes all expenses, other than the residual ones themselves, from these three accounts as well as from certain cost pools in Account 6623 - Customer services and Account 6722 - External relations expense.[160] Maryland argues that the *Joint Cost Order* does not require a single marketing allocator for all residual marketing costs. Maryland contends that Bell Atlantic should calculate separate allocators for each residual marketing cost pool on the basis of the apportionment of the other marketing costs within the expense account to which the cost pool relates.[161] Bell Atlantic replies that the *AT & T Order* addressed this precise point and held that a single marketing allocator must be used.[162]

80. Bell Atlantic is correct. In the *AT & T Order*, we rejected AT&T's claim that particular activities should have corresponding particular marketing allocators composed of expenses only from those activities. We stated that there is only one marketing allocator to be applied and that it must be based on the ratio of all marketing expenses that are assigned or attributed.[163] Bell Atlantic's treatment of its marketing costs is consistent with that holding.[164]

Account 6623 - Customer Services

81. The apportionment method for this account proposed in Bell Atlantic's initial manual was deficient in a number of respects, and the *Bell Atlantic Order* required substantial changes.[165] In its revisions, Bell Atlantic proposes an almost completely new method.[166] Maryland challenges two aspects of Bell Atlantic's proposals.

82. The first challenge concerns Bell Atlantic's proposal to use "End User Revenues" to apportion its "Account Maintenance and Customer Billing Expense - End User Collection Activities" and "Account Maintenance And Customer Billing Expense - End User Customer Accounting, Bill Processing and Payment Activities" cost pools. Maryland argues that Bell Atlantic is directly assigning Account 5081 - End user revenue - entirely to regulated activities and, therefore, that "End User Revenues" cannot serve as a valid apportionment factor.[167] Bell Atlantic answers that, as used in its manual, the phrase "End User Revenues" means, not Account 5081, but rather the "ratio of nonregulated revenues to total revenues, exclusive of carrier access."[168]

83. Even with Bell Atlantic's clarification, this apportionment factor is inconsistent with the Commission's determination that "'revenues measure only the ability of an activity to bear costs, and not the amount of resources used by the activity.'"[169] Bell Atlantic must revise its manual to provide a cost causative apportionment factor for these cost pools, such as a statistical average of the relative regulated and nonregulated lines on end user bills employed by other carriers.

84. Maryland's second challenge concerns Bell Atlantic's proposal to assign three of its cost pools within this account directly to regulated activities. Maryland asserts that these pools "undoubtedly include[] billing of nonregulated activity.[170] Bell Atlantic replies by enumerating the functions these cost pools encompass, all of which it claims are exclusively regulated."[171]

85. According to Bell Atlantic's reply, these cost pools include costs relating to processing local messages, processing toll messages, handling annoying calls, and carrier access billing. We agree that each of these functions is a regulated function. However, the reply also states that one of these pools includes costs relating to the provision of customer names and addresses.[172] In its further revisions, Bell Atlantic must either show in detail why that function should be classified as regulated or propose a method for apportioning its costs to nonregulated activities.[173]

Account 6711 - Executive Expense

86. In its initial manual, Bell Atlantic proposed to use the general allocator to apportion this account. In the *Bell Atlantic Order*, we found this method inadequate, because we believed that the cost of using direct assignment or attribution for portions of this account would be low. We required that Bell Atlantic either propose a cost causative apportionment method for this account or justify in detail why it must resort to the general allocator.[174]

87. Bell Atlantic's revisions propose to apportion this entire account in proportion to "Total Wages and Salaries."[175] We believe that this apportionment factor also fails to reflect the causes of Bell Atlantic's executive expense.[176] Bell Atlantic should be able, with reasonable effort, to identify executive expense that can be directly assigned to regulated and nonregulated activities. Indeed, we discern no reason why a carrier, such as Bell Atlantic, that lists "CPE Planning" and "Enhanced Services Planning" among its nonregulated activities might be unable to track, with minimal effort, the direct executive costs associated with that activity. Accordingly, we require that Bell Atlantic establish direct assignment cost pools within Account 6711 for executive expense. In its further revisions, Bell Atlantic shall describe the procedures it intends to follow to identify the costs to be assigned to these cost pools.[177]

Account 6722 - External Relations Expense

88. Bell Atlantic's initial and revised manuals both include a "Corporate Advertising Expense" cost pool within this account. In its initial manual, Bell Atlantic proposed to use time and expense reporting to apportion this pool. In its comments on that manual, the Pennsylvania Office of Consumer Advocate argued that the general allocator should be applied to this cost pool. Although Bell Atlantic agreed to incorporate that change into its manual, we directed Bell Atlantic to retain the method it originally proposed. We stated that time and expense reporting is a superior apportionment method than use of the general allocator.[178]

89. In its revisions, Bell Atlantic again proposes to apply the general allocator to this cost pool. Bell Atlantic states it has attempted to implement our directive to use time and expense reporting to apportion this pool, but has been unable to do so. Bell Atlantic states further that its corporate advertising expenses are truly common costs and cannot be associated with regulated or nonregulated activities. Bell Atlantic suggests, however, that it be permitted to apply the marketing allocator to this cost pool in the event we reject its proposed use of the general allocator.[179]

90. While we continue to see that time and expense reporting is a superior apportionment method, we are convinced that it is impossible to apply that method to

Bell Atlantic's corporate advertising expense. Nevertheless, we must again reject Bell Atlantic's proposal to use the general allocator to apportion that expense. Bell Atlantic has established that its corporate advertising expenses are residual marketing costs. In the *Joint Cost Order*, the Commission determined that all such costs must be apportioned using the marketing allocator.[180] Accordingly, we require Bell Atlantic to implement its alternative proposal to apply the marketing allocator to this cost pool.

Account 6728 - Other General and Administrative Expense

91. In its initial manual, Bell Atlantic proposed separate cost pools and apportionment methods for employee benefit payments, depending on whether the employees were nonactive or active. The cost pool for nonactive employees was to be apportioned using the general allocator, while the cost pool for active employees was to be apportioned in proportion to total company wages and salaries.[181] We did not specifically discuss these two cost pools in the *Bell Atlantic Order*, and Bell Atlantic has proposed the same treatment in its revisions.[182]

92. The D.C. Commission asserts that both cost pools should be allocated by total wages and salaries because both are related to Bell Atlantic's employee activity.[183] Bell Atlantic counters that the Bureau has already approved this treatment. Moreover, it claims, employee benefit payments to active employees are related to current wages and salaries, whereas those to nonactive employees assertedly are not.[184]

93. We agree that Bell Atlantic's benefit payments to nonactive employees are not closely related to its current expenses. However, Bell Atlantic's position on this issue implies that it believes that those payments are more closely related to its overall expenses than to its wages and salary expenses. We see no basis for such a belief. On the contrary, we are convinced that Bell Atlantic's obligations to make benefit payments and pay wages and salaries arise from similar sources. Accordingly, we require Bell Atlantic to implement the D.C. Commission's proposal for these benefit payments.

Account 7140 - Gains and Losses from Foreign Exchange

94. In its revisions, Bell Atlantic proposes to assign this account directly to regulated activities.[185] Maryland observes that entries in this account arise from purchasing foreign equipment or marketing services abroad, which may involve nonregulated activities. Accordingly, Maryland concludes, the gains and losses in the account should be assigned or apportioned to regulated and nonregulated activities on a case-by-case basis.[186] Bell Atlantic answers that the new USOA introduced this account on January 1, 1988, and that its operating companies have recorded no transactions in it. Furthermore, Bell Atlantic claims, any future transactions would be likely to involve gains and losses that are too small to justify detailed analysis, and use of the general allocator would be appropriate.[187]

95. This account reflects the telephone operating companies' gains gains and losses from the exchange of foreign currency. Since those companies engage in both regulated and nonregulated activities, it would be inappropriate to assign this account directly to regulated activities. While, as Maryland suggests, the analysis of individual transactions would be an acceptable apportionment method for this account, we find that application of the general allocator is also acceptable for companies, like Bell Atlantic, that neither engage in the provision of foreign telecommunications services nor have extensive foreign operations.

Account 7210 - Operating Investment Tax Credits - Net, Account 7220 - Operating Federal Income Taxes, Account 7230, Operating State and Local Income Taxes, and Account 7250 - Provision for Deferred Operating Income Taxes - Net

96. In its initial manual, Bell Atlantic proposed to use "relative taxable income" to apportion its current income taxes and an evaluation of the "assets, liabilities, or items of income that gave rise to the deferral" to apportion its deferred taxes.[188] We concluded that applying different apportionment bases to different tax accounts could result in an apportionment of costs that is not consistent with related book income. We directed Bell Atlantic to apportion the total income tax for the period on the basis of specifically-defined book income.[189]

97. Bell Atlantic's revisions do not comply strictly with our requirement in the *Bell Atlantic Order* that operating income taxes and deferred operating income taxes be apportioned on book income. This procedure appears to be equitable and easy to apply.[190] Rather Bell Atlantic continues to apportion deferred taxes on the basis of investment, directly assigns "Pre-1/1/88 Adjustments" to regulated activities, and creates other cost pools that are contrary to the method we specified.[191] Accordingly, we direct Bell Atlantic to comply with our previous requirements. [192]

Account 7240 - Operating Other Taxes

98. In its initial manual, Bell Atlantic proposed to apportion its cost pool for "Other Taxes" within this account using the general allocator. In the *Bell Atlantic Order*, we required that Bell Atlantic either justify that proposal or submit a better apportionment factor for this pool. [193] Bell Atlantic's revisions propose to apportion this pool in proportion to its relative investment in telecommunications plant in service. Bell Atlantic states that the pool includes license fees, workmen's compensation administration fund taxes, federal superfund taxes, and other miscellaneous taxes. [194]

99. The D.C. Commission objects to Bell Atlantic's apportionment factor. The D.C. Commission claims that workmen's compensation administration fund taxes are not asset-related and should be apportioned on the basis of wages and salaries. The D.C. Commission also maintains that, absent further explanation, Bell Atlantic should either use wages and salaries or the general allocator to apportion this pool. [195] Bell Atlantic replies that all workmen's compensation administration fund taxes in this pool are for Bell of Pennsylvania, that these taxes are very minor, and that no other taxes in this pool are asset-related. Therefore, Bell Atlantic argues, the general allocator would be a better apportionment factor for this pool than wages and salaries. [196]

100. This cost pool contains both asset-related taxes and taxes that are not asset-related, and thus neither parties' proposal is consistent with the Commission's requirement that accounts be divided into homogeneous cost pools that can be apportioned between regulated and nonregulated activities on a cost causative basis. [197] We believe that a valid approach would be for Bell Atlantic to disaggregate this pool into separate pools for asset-related taxes and for

taxes that are not asset-related. The first of these pools would be apportioned on the basis of overall investment, as Bell Atlantic proposes. The second pool would be apportioned in proportion to current wages and salaries, as the D.C. Commission suggests. Bell Atlantic shall revise its apportionment method for this pool accordingly.

III. ORDERING CLAUSES

101. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communication's Act of 1934, as amended, 47 U.S.C. §154(i), that the March 14, June 30, and September 30, 1988 revisions to Bell Atlantic's Cost Allocation Manual ARE APPROVED, subject to the conditions stated in this Order.

102. IT IS FURTHER ORDERED that the revisions required herein shall be filed no later than February 28, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, CC Docket 86-111, 2 FCC Rcd 1298 (1987)(*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283 (1987)(*Reconsideration Order*), *further recon.*, 3 FCC Rcd 6701 (1988)(*Further Reconsideration Order*), *petitions for review pending*, Southwestern Bell Tel. Corp. v. FCC, D.C. Circuit No. 87-1764 (filed Dec. 14, 1987); National Tel. Cooperative Ass'n v. FCC, D.C. Circuit No. 87-1771 (filed Dec. 15, 1987).

[2] The Bell Atlantic Telephone Companies are Bell Telephone Company of Pennsylvania (Bell of Pennsylvania), the four Chesapeake and Potomac Telephone Companies (collectively, C&P), Diamond State Telephone Company (Diamond State), and New Jersey Bell Telephone Company (New Jersey Bell).

[3] Bell Atlantic Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 109 (1988)(*Bell Atlantic Order*).

[4] *Id.* at 109, para. 2; *id.* at 123, paras. 133-34.

[5] Bell Atlantic May 9 Reply at 1.

[6] Bell Atlantic may consolidate its March 31, 1989 quarterly update, if any, with this filing.

[7] *Bell Atlantic Order*, 3 FCC Rcd at 109, para. 3.

[8] With regard to those revisions that Bell Atlantic claims it cannot make retroactively, we reserve the right to require either retroactivity or subsequent adjustments to reflect the impact of the lack of retroactivity on 1988 operations. Bell Atlantic may also implement as of January 1, 1988, any of the June 30 and September 30 revisions that we approve in this Order. *See* Letter from James J. Farrell, Executive Director - FCC Contact, Bell Atlantic, to H. Walker Feaster, Acting Secretary, Federal Communications Commission (June 30, 1988)(request for January 1, 1988 implementation date for certain of the June 30 revisions)(*June 30 Cover Letter*).

[9] *Bell Atlantic Order*, 3 FCC Rcd at 110, paras. 7-8; *see also Joint Cost Order*, 2 FCC Rcd at 1317-19, paras. 147-64.

[10] *Bell Atlantic Order*, 3 FCC Rcd at 110, paras. 6-8.

[11] Maryland Comments at 2.

[12] *Id.* at 7-8.

[13] MCI Comments at 3-5.

[14] *Id.* at 5.

[15] *Id.* at 5-8.

[16] Maryland Reply at 2-3.

[17] Bell Atlantic May 9 Reply at 2-3.

[18] *Bell Atlantic Order*, 3 FCC Rcd at 110, paras. 7-8.

[19] *See Reconsideration Order*, 2 FCC Rcd at 6305, para. 191.

[20] *See Joint Cost Order*, 2 FCC Rcd at 1355, n.390; *accord Reconsideration Order*, 2 FCC Rcd at 6305, para. 191.

[21] *Cf. Joint Cost Order*, 2 FCC Rcd at 1355, n.390 (level of detail is comparable to that in Separations Manual, not that in the former Division of Revenues procedures).

[22] *See Joint Cost Order*, 2 FCC Rcd at 1333, para. 274.

[23] *Id.* at 1329, para. 242; *id.* at 1334, para. 283.

[24] *See id.* at 1333, para. 274.

[25] *Joint Cost Order*, 2 FCC Rcd at 1328, para. 240.

[26] *Bell Atlantic Order*, 3 FCC Rcd at 110, para. 10.

[27] Maryland Comments at 1-2.

[28] Bell Atlantic May 9 Reply at 3, n.7.

[29] *Cf.* U S West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 195, 197, para. 17 (1988)(*U S West Order*) (cross referencing requirement imposed when carrier had proposed few cost pools and had relied on apportionment proposals that are inconsistent with Commission rules).

[30] *See* para. 14, *supra*.

[31] For instance, a revision that proposes to apply a previously explained apportionment factor to an additional cost pool might require only minimal explanation. In contrast, the addition of a nonregulated activity might appropriately be accompanied by a showing of how approval of the addition would not result in an inaccurate apportionment of costs and revenues between regulated and nonregulated activities. Such a showing might focus on the cost pools affected most directly by the nonregulated activity and, in particular, on any usage measurement that might be applied to the activity. *See also* para. 39, *infra* (requirement to state which enhanced services are supported on a nontariffed basis by particular cost pools).

[32] *See* Bell Atlantic Revised Manual at pp. 6.15-1 & 6.19-1 to 6.21-1.

[33] *See Joint Cost Order*, 2 FCC Rcd at 1307-08, paras. 70-78; *id.* at 1350, n.149. Although we did not raise this matter in the *Bell Atlantic Order*, it is sufficiently important to warrant action at this time.

[34] Bell Atlantic Initial Manual at p. 4-2.

[35] *Bell Atlantic Order*, 3 FCC Rcd at 110-11, para. 14.

[36] Bell Atlantic Revised Manual at p. 4-4.

[37] *See* Nevada Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs and Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, DA 88-1875, slip op. at 4, para. 26 (adopted Nov. 30, 1988)(*Nevada and Pacific Compliance Order*).

[38] *Bell Atlantic Order*, 3 FCC Rcd at 119, para. 97; *id.* at 127, n.129.

[39] Bell Atlantic Revised Manual at p. 4-2.

[40] *See* NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 5978, 5980, para. 17 (1988)(*NYNEX Compliance Order)* (cable installation for cable television companies is separate line of business).

[41] *Bell Atlantic Order*, 3 FCC Rcd at 111-12, paras. 19-22.

[42] Bell Atlantic Revised Manual at p. 6.0-3. This definition was not in Bell Atlantic's initial manual.

[43] D.C. Commission April 22 Comments at 3; Maryland Reply at 4-5.

[44] Bell Atlantic May 9 Reply, Attachment I at 5.

[45] *Bell Atlantic Order*, 3 FCC Rcd at 111-12, paras. 19-22.

[46] 47 C.F.R. §32.27(d).

[47] *See* para. 26, *supra*.

[48] *Joint Cost Order*, 2 FCC Rcd at 1336, paras. 294-99.

[49] Bell Atlantic Revised Manual at p. 6.0-3.

[50] *Id.*

[51] *Id.* at pp. 6.1-1, 6.7-1, 6.11-1, 6.18-1.

[52] *See* Ameritech Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 6009, 6011, para. 20 (1988) (*Ameritech Compliance Order)*.

[53] Bell Atlantic Revised Manual at p. 6.7-1.

[54] *Id.*

[55] *See* 47 C.F.R. §32.27(d).

[56] We note that because the costs of these services will be incorporated into the calculation of Bell Atlantic's marketing and general allocators, the services' treatment will affect interstate ratepayers.

[57] Bell Atlantic Revised Manual at p. 6.20-1.

[58] *See* 47 C.F.R. §32.27(d).

[59] Bell Atlantic Revised Manual at Figure 8A.

[60] D.C. Commission April 22 Comments at 4-5.

[61] Bell Atlantic May 9 Reply, Attachment I at 6.

[62] We address nonproductive time in paragraph 36, *infra*.

[63] Bell Atlantic Revised Manual at pp. 8-5 to 8-6.

[64] *Id.* at p. 8-6.

[65] Although we did not raise this matter in the *Bell Atlantic Order*, it is sufficiently important to warrant action at this time.

[66] *Bell Atlantic Order*, 3 FCC Rcd at 115, para. 57; *id.*, para. 61.

[67] *See, e.g., id.* at 118, paras. 81-86; *id.* at 120, para. 107.

[68] *See id.* at 117-18, paras. 78-86; *id.* at 120, paras. 106-07.

[69] Bell Atlantic Revised Manual at p. 3.2-1 to 3.2-4.

[70] *Id.* at pp. 7.8-10, 7.8-26.

[71] Bell Atlantic Initial Manual at pp. 7.8-7, 7-8.9.

[72] *Bell Atlantic Order*, 3 FCC Rcd at 115, para. 57; *id.*, para. 61; *id.* at 117-18, paras. 78-86.

[73] Bell Atlantic March 14 Revisions at pp. 7.2-14, 7.2-16, 7.8-10.

[74] Maryland Comments at 4.

[75] Bell Atlantic May 9 Reply, Attachment I at 2, *citing Bell Atlantic Order*, 3 FCC Rcd at 115, para. 56.

[76] *See North American Telecommunications Ass'n*, 3 FCC Rcd 4385, 4392, para. 50 (1988)(*NATA / Centrex Reconsideration Order)*.

[77] Bell Atlantic September 30 Revisions at 7.8-10

[78] *See* para. 42, *supra*.

[79] Bell Atlantic Revised Manual at pp. 7.2-14 to 7.2-14a, 7.8-10.

[80] *Id.* at pp. 7.2-14 to 7.2-14a.

[81] *See Bell Atlantic Order*, 3 FCC Rcd at 117, para. 75 (similar requirement regarding building usage study).

[82] Bell Atlantic Revised Manual at p. 7.8-10.

[83] *Id.* at pp. 7.2-14a, 7.2-16.

[84] *Cf. Bell Atlantic Order*, 3 FCC Rcd at 115, para. 61 (although failure to explain "weighted measurements" a matter of concern, hypothetical nature of the apportionment eliminated need to evaluate the measurements).

[85] *See* para. 44, *supra*.

[86] Bell Atlantic Revised Manual at pp. 7.2-14b, 7.2-16a.

[87] *Id.*

[88] D.C. Commission November 17 Comments at 1-2.

[89] Bell Atlantic December 1 Reply at 2.

[90] Bell Atlantic Revised Manual at pp. 7.6-8a to 7.6-9.

[91] *Joint Cost Order*, 2 FCC Rcd at 1320, para. 173; *see also* Nevada Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs and Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 287, 295, para. 76 (*Nevada and Pacific Order)*.

[92] *See Nevada and Pacific Compliance Order*, slip op. at 5-6, para. 43. We note that calculating apportionment factors based on results for the prior month appears to be sufficient to constitute apportionment based on current usage.

[93] Bell Atlantic Revised Manual at p. 7.8-26.

[94] *Id.* at p. 7.8-10.

[95] Bell Atlantic uses weighted call attempts to forecast usage of its only shared cost pool within Account 2211. *See* Bell Atlantic Revised Manual at p. 7.2-14a; *see also* para. 45, *supra*.

[96] *See id.*

[97] Bell Atlantic Revised Manual at p. 7.8-26.

[98] *Id.* at p. 7.8-10.

[99] *See Nevada and Pacific Compliance Order*, slip op. at 6, para. 48.

[100] D.C. Commission April 22 Comments at 2.

[101] *Id., citing* Bell Atlantic March 14 Revisions at pp. 2-5, 7.7-6.

[102] Bell Atlantic May 9 Reply at 5.

[103] *E.g.*, Bell Atlantic Revised Manual at p. 7.8-31.

[104] *Id.* at pp. 7.8-26, 7.8-31, 7.8-37.

[105] BellSouth Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, DA 88-1840, slip op. at 4, para. 23 (released Dec. 7, 1988) *(BellSouth Compliance Order)*.

[106] *Bell Atlantic Order*, 3 FCC Rcd at 116, para. 64.

[107] *Id.*, para. 65.

[108] Bell Atlantic Revised Manual at pp. 7.8-4, 7.8-16.

[109] *Nevada and Pacific Compliance Order*, slip op. at 9, para. 73.

[110] Bell Atlantic Revised Manual at pp. 7.8-4, 7.8-16.

[111] Maryland Comments at 3.

[112] Bell Atlantic May 9 Reply, Attachment I at 1.

[113] *Bell Atlantic Order*, 3 FCC Rcd at 116, para. 64.

[114] *See* Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, 3 FCC Rcd 269, 275, para. 43 *(1987)(Rate Base Order), petitions for recon. pending; id.* at 284-85, to *be codified* at 47 C.F.R. §§65.820(3); 65.830(a)(3).

[115] Bell Atlantic Initial Manual at pp. 7.1-7, 7.8-5.

[116] *Bell Atlantic Order*, 3 FCC Rcd at 117, para. 76.

[117] Bell Atlantic Revised Manual at pp. 7.2-7, 7.8-7.

[118] Maryland Comments at 3.

[119] Bell Atlantic May 9 Reply, Attachment I at 1.

[120] *Id.*

[121] *See* para. 87, *infra*.

[122] *See* Bell Atlantic Initial Manual at pp. 7.1-8 to 7.1-10, 7.8-5.

[123] *Bell Atlantic Order*, 3 FCC Rcd at 115, para. 53.

[124] Bell Atlantic Revised Manual at p. 7.8-8.

[125] *Id.* at p. 7.2-9.

[126] *Id.*

[127] *Id.* at p. 7.8-7; Bell Atlantic Initial Manual at p. 7.8-5.

[128] *See Nevada and Pacific Compliance Order*, slip op. at 7, para. 56.

[129] *Bell Atlantic Order*, 3 FCC Rcd at 119, para. 98.

[130] *See* Bell Atlantic Revised Manual at pp. 7.2-26 to 7.2-30, 7.8-14. We discuss this study in paragraphs 61-62, *supra*.

[131] *Bell Atlantic Order*, 3 FCC Rcd at 120, para. 101; *id.* at 121, para. 113; *see also Joint Cost Order*, 2 FCC Rcd at 1326, paras. 217-20.

[132] *Bell Atlantic Order*, 3 FCC Rcd at 120, para. 101.

[133] *Id.* at 121, para. 113.

[134] *See id.* at 120, para. 101; *id.* at 121, para. 113.

[135] *Id.*

[136] Bell Atlantic Revised Manual at pp. 7.8-16, 7.8-31.

[137] *See* para. 53, *supra*.

[138] *Bell Atlantic Order*, 3 FCC Rcd at 116, para. 63.

[139] Bell Atlantic Revised Manual at pp. 7.5-2, 7.5-12, 7.8-18, 7.8-22.

[140] Maryland Comments at 4-5.

[141] *Id.* at 5.

[142] Bell Atlantic May 9 Reply, Attachment I at 2-3, *citing* Letter from Kenneth P. Moran, Chief, Accounting and Audits Division, to David J. Hesidence, Director, Federal Relations, Bell Atlantic Network Services, Inc. (Mar. 11, 1988) *(Revenue Accounting Letter)*.

[143] Bell Atlantic May 9 Reply, Attachment I at 2-3.

[144] *Reconsideration Order*, 2 FCC Rcd at 6307, paras. 207-08.

[145] *See generally Further Reconsideration Order*, 3 FCC Rcd at 6701, paras. 4-5.

[146] Bell Atlantic Petition for Further Reconsideration of *Reconsideration Order* at 3, n.10.

[147] *See* Letter from David J. Hesidence, Director, Federal Relations, Bell Atlantic Network Services, Inc., to Kenneth P. Moran, Chief, Accounting and Audits Division (Feb. 25, 1988).

[148] Bell Atlantic Revised Manual at pp. 7.8-11, 7.8-13.

[149] *Further Reconsideration Order*, 3 FCC Rcd at 6702-03, paras. 12-13.

[150] *Id.*, slip op. at 12, para. 12.

[151] *Id.*, slip op. at 9, n.10.

[152] *Bell Atlantic Order*, 3 FCC Rcd at 120, para. 103.

[153] Bell Atlantic Revised Manual at pp. 7.5-13, 7.8-23.

[154] *See U S West Order*, 3 FCC Rcd at 206, para. 104.

[155] *Bell Atlantic Order*, 3 FCC Rcd at 120, para. 105.

[156] Bell Atlantic Revised Manual at p. 7.8-25.

[157] *See BellSouth Compliance Order*, slip op. at 4, para. 23; *see also Ameritech Compliance Order*, 3 FCC Rcd at 5889, para. 37.

[158] *See* para. 63, *supra*.

[159] *See* Bell Atlantic Revised Manual at pp. 7.6-3 to 7.6-6, 7.8-25.

[160] *Id.* at pp. 7.6-25 to 7.6-30, 7.6-34, 7.8-32.

[161] Maryland Comments at 5-6.

[162] Bell Atlantic May 9 Reply, Attachment I at 3, *citing* American Telephone & Telegraph Company's Permanent Cost Allocation Manual for the Separation of Regulated and Non-regulated Costs, 3 FCC Rcd 1786, 1790, para. 33 (AT&T *Order*).

[163] AT&T *Order*, 3 FCC Rcd at 1790, para. 33; accord *Joint Cost Order*, 2 FCC Rcd at 1323-24, paras. 196-203.

[164] We note that Bell Atlantic is apportioning its support and general administration expense within both Account 6611 and Account 6612 in proportion to its directly assigned expenses within the particular account. Bell Atlantic Revised Manual at p. 7.8-32. This approach is consistent with the requirement that each carrier employ a single marketing allocator and with Maryland's position that common marketing costs should be apportioned in proportion to directly assigned and attributable marketing costs within the same account.

[165] *See Bell Atlantic Order*, 3 FCC Rcd at 121-22, paras. 118-20.

[166] Bell Atlantic Revised Manual at pp. 7.6-28 to 7.6-30, 7.8-34.

[167] Maryland Comments at 6.

[168] Bell Atlantic May 9 Reply, Attachment I at 3.

[169] *Joint Cost Order*, 2 FCC Rcd at 1318, para. 160, *quoting* Notice of Proposed Rule Making, 104 FCC 2d 59, 81-82.

[170] Maryland Comments at 6-7.

[171] Bell Atlantic May 9 Reply, Attachment I at 3-4.

[172] *Id.*

[173] *Cf.* para. 20, *supra*.

[174] *Bell Atlantic Order*, 3 FCC Rcd at 122, para. 121.

[175] Bell Atlantic Revised Manual at pp. 7.6-31, 7.8-35.

[176] Bell Atlantic has not attempted to justify this proposed apportionment factor.

[177] *See NYNEX Compliance Order*, 3 FCC Rcd at 5983-84, para. 51.

[178] *Bell Atlantic Order*, 3 FCC Rcd at 122, para. 123.

[179] June 30, 1988 Cover Letter, *supra* note 8, at 2.

[180] *Joint Cost Order*, 2 FCC Rcd at 1324, para. 203.

[181] Bell Atlantic Initial Manual at pp. 7.5-29 to 7.5-30, 7.8-35.

[182] Bell Atlantic Revised Manual at pp. 7.6-38 to 7.6-39, 7.8-39.

[183] D.C. Commission April 22 Comments at 3-4.

[184] Bell Atlantic May 9 Reply, Attachment I at 4.

[185] Bell Atlantic Revised Manual at pp. 7.7-1, 7.8-40.

[186] Maryland Comments at 7.

[187] Bell Atlantic May 9 Reply, Attachment I at 4.

[188] Bell Atlantic Initial Manual at p. 7.8-36.

[189] *Bell Atlantic Order*, 3 FCC Rcd at 123, para. 129.

[190] *See, e.g.*, NYNEX Cost Allocation Manual at 146, *approved NYNEX Compliance Order*, 3 FCC Rcd at 5984, para. 59.

[191] Bell Atlantic Revised Manual at pp. 7.8-40 to 7.8-41.

[192] Bell Atlantic may use an investment-based apportionment method for Account 7250, if it follows the procedure described in the *BellSouth Compliance Order*, slip op. at 6, para. 38.

[193] *Bell Atlantic Order*, 3 FCC Rcd at 123, para. 130.

[194] Bell Atlantic Revised Manual at pp. 7.7-5 to 7.7-6,.78-41.

[195] D.C. Commission April 22 Comments at 4.

[196] Bell Atlantic May 9 Reply, Attachment I at 4-5.

[197] *See Joint Cost Order*, 2 FCC Rcd at 1317-19, paras. 147-64.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Request for Waiver of

EDS SPECTRUM CORPORATION

Application to use five of the
150 channels designated for
conventional use in the trunked
mode of operation.

ORDER

Adopted: December 22, 1988; Issued: January 9, 1989

By the Chief, Land Mobile and Microwave Division:

1. The Chief of the Land Mobile and Microwave Division of the Private Radio Bureau has for consideration a request for waiver of Section 90.615 of the Commission's Rules, 47 C.F.R. § 90.615, filed by EDS Spectrum Corporation (EDS). EDS, a subsidiary of the General Motors Corporation, has submitted an application to license a five channel trunked radio system in Doraville, Georgia. EDS would like to use five unused (unlicensed) conventional channels that are available under Section 90.615. Frequencies available under that section may only be used for conventional operations; trunked operations are not permitted. EDS states that there are no trunked frequencies available for assignment in Doraville, a suburb of Atlanta. Although EDS has considered using the channels in the conventional mode, it believes that greater spectrum efficiency will result from trunking these channels.

2. We agree with EDS that allowing trunking on these channels in these circumstances would increase spectrum efficiency.[1] There are, however, other criteria besides spectrum efficiency that we must consider in deciding upon this request. We must determine whether allowing EDS to trunk these unused 800 MHz conventional channels is in the public interest.[2]

3. The frequencies specified in Section 90.615 were set aside for the needs of users who desire 800 MHz operations but do not require a trunked system. There has been, however, no expression of interest by another party for the channels requested by EDS. Allowing EDS to trunk these unused frequencies is consistent with Commission's objectives of promoting the development and use of spectrum efficient technologies to facilitate maximum use of scarce spectrum resources. Because of its initial mobile loading, EDS could license all five channels and operate them in the conventional mode on an exclusive basis.[3] To require EDS to obtain a license and construct a five channel conventional system and then seek to convert it to a trunked system would cause inefficiences from both an administrative and technical standpoint. Therefore, we conclude that it is in the public interest to allow EDS to use these channels in the trunked mode of operation, pending the outcome of any further proceedings in PR Docket No. 87-213.

4. Accordingly, EDS' request for waiver of Section 90.615 of the Rules to trunk five unused (unlicensed) conventional channels is granted, pursuant to Section 0.331 of the Rules,[4] subject to the filing of the appropriate frequency coordination documents, and also subject to the outcome of any further proceedings in PR Docket No. 87-213. The co-channel protection criteria for conventional systems specified in Section 90.621 of the Rules[5] will remain applicable despite the fact that the frequencies will be used in the trunked mode.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and Microwave Division
Private Radio Bureau

FOOTNOTES

[1] In this regard, the Commission has recently proposed to allow trunking on the 150 conventional channels. *See* Notice of Proposed Rule Making, PR Docket No. 87-213, adopted December 12, 1988, FCC 88-404. In that proceeding, the Commission stated that it did not plan to entertain any requests filed during the pendency of that proposal for waiver of the Rules to trunk on the conventional channels. Because this request was filed before that item was adopted, we will act on this particular case.

[2] *See* WAIT Radio vs. FCC, 418 F.2d 1153 (D.C. Cir. 1969). *See also*, Section 90.151 of the Commission's Rules, 47 C.F.R. § 90.151.

[3] EDS states that the system would be used immediately by 350 mobile stations with some 150 mobiles being added within two years of commencing operation.

[4] *See* 47 C.F.R. § 0.331.

[5] *See* 47 C.F.R. § 90.621.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 90.611(d)
of the Commission's Rules
Governing the Application
Processing Procedures for
the 900 MHz Private Land
Mobile Radio Band

ORDER

Adopted: December 27, 1988; Released: January 9, 1989

By the Chief, Private Radio Bureau:

INTRODUCTION

1. We have before us a Petition for Rule Making (Petition) filed on September 14, 1988, by the National Association of Business and Educational Radio, Inc. (NABER) concerning the Commission's processing procedures for 900 MHz Specialized Mobile Radio (SMR) applications. NABER requests that the Commission amend Section 90.611(d) of the Rules[1] to grant a preference to licensees of existing fully loaded, 800 MHz trunked SMR systems who are seeking a 900 MHz SMR system in the same geographic area. Under the proposed scheme, we would first grant available 900 MHz channels to expand existing fully loaded trunked 900 MHz SMR systems. Second, we would grant channels to licensees of fully loaded, trunked 800 MHz SMR systems. Lastly, we would give channels to applicants seeking a new 900 MHz SMR facility. Petition, 5.

BACKGROUND

2. Section 90.611(d) of the Rules sets forth the waiting list procedures for processing applications in the 800/900 MHz bands. Under Section 90.611(d), when there are no frequencies available in a given location, the Commission places applications on a waiting list according to their date of receipt. Currently, separate 800 MHz and 900 MHz waiting lists are established for applications requesting frequencies in the SMR category identified in Subpart S of the Commission's Rules.[2] Each waiting list has two groups. [3] For the 900 MHz waiting list, the first group consists of applications from existing licensees of fully loaded, 900 MHz trunked SMR systems seeking additional channels. These licensees receive available channels prior to those in the second group, regardless of the application filing dates. The second group consists of applications for new 900 MHz SMR systems or for use of the channels for conventional systems. We grant a preference to existing licensees of trunked systems seeking to expand because to do so results in more efficient use of the spectrum than if the channels were assigned to new applicants or to licensees for conventional systems.[4]

3. NABER argues that the same reasons that support awarding a preference to licensees of 800 MHz SMR trunked systems seeking to expand apply equally to licensees of 800 MHz SMR systems seeking to establish 900 MHz SMR systems. Petition, 5-6. In support thereof, NABER argues that its proposal would deter speculators. *Id.* at 6. NABER also contends that because existing 800 MHz SMR operators have demonstrated their business acumen by operating their 800 MHz SMR systems successfully, a preference is justified. Lastly, NABER advocates that enabling 800 MHz SMR licensees to establish 900 MHz SMR systems would be more spectrally efficient than maintaining independent systems. *Id.*

4. The arguments advanced by NABER's Petition fail to provide a sufficient basis for Commission action, especially when we have declined to adopt similar proposals in prior decisions. Thus, by this *Order*, we dismiss the instant Petition.

DISCUSSION

5. Section 1.401(e)[5] of the Commission's Rules authorizes the Commission to dismiss repetitious petitions. Similarly, Section 0.331 of the Commission's Rules[6] grants the Chief, Private Radio Bureau, the authority to dismiss petitions for rule making that are not new or novel. In this case, the Commission has considered and dismissed proposals similar to NABER's on two prior occasions. In September 1986 the Commission reviewed its rules governing processing of 900 MHz applications and declined to adopt the type of preferences contemplated here by NABER.[7] As recently as March 1988 the Commission reiterated its policy of maintaining separate and unrelated waiting lists for the 800 MHz and 900 MHz frequencies.[8] NABER has not presented any new evidence, facts or circumstances warranting a change in these application procedures. Furthermore, NABER has not demonstrated that the expected benefits of providing a preference to existing 800 MHz licensees outweigh those fostered by our current application procedures.

6. Since the adoption of our present policies and procedures regarding waiting lists for 800 and 900 MHz frequencies, there has not been sufficient technological change in the SMR equipment market to warrant pursuing NABER's proposals at this time. The 800 MHz and 900 MHz SMR systems are technically incompatible. Thus, allowing one licensee to own both an 800 MHz and a 900 MHz system does not promote spectrum efficiency, the central objective of our present preference scheme. Since, therefore, both systems would be equivalent in their ability to serve end users, granting a preference for 900 MHz channels to an existing 800 MHz SMR provider over a new applicant would not advance our goals of promoting efficient utilization of SMR allocations and achieving a competitive marketplace.

7. Moreover, our present policy concerning application procedures for the 900 MHz SMR systems promotes competition by encouraging new applicants to enter the market. Aside from granting a preference to fully loaded 900 MHz SMR systems, the Bureau considers the 800 MHz licensees equal to all other applicants seeking to obtain licenses for 900 MHz SMR frequencies. This is true even if the licensee owns an 800 MHz SMR facility that is not fully loaded.[9] Moreover, the Commission has previously considered the issue of congestion identified here by NABER and has implemented several other procedures to

provide spectrum relief to licensees of 800 MHz SMR systems. For example, under the Commission's channel recovery program, the Commission recovers frequencies from SMR operators who have failed to construct the facility within the required amount of time or who have failed to satisfy the mobile loading requirements under Sections 90.631 and 90.633 of the Rules.[10] These are then reassigned to SMR operators seeking additional channels or to applicants seeking to create a new facility. The Commission also allows intercategory sharing[11] and permits partial assignments.[12]

8. Given these considerations, we conclude that the Commission's present policies and rules governing the assignment of 900 MHz SMR frequencies best serve the public interest. These policies allow users to benefit from the efficiencies of trunking by promoting system growth at 900 MHz. At the same time, our existing policies promote an open and competitive atmosphere and ensure that the spectrum is used in the most efficient manner.

9. Accordingly, IT IS ORDERED that the Petition for Rule Making filed by the National Association of Business and Educational Radio, Inc. IS HEREBY DISMISSED. This action is taken under the authority set forth in Sections 0.331, 1.401 and 1.407 of the Commission's Rules.[13]

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] 53 Fed. Reg. 12154 (1988) (to be codified at 47 C.F.R. § 90.611(d)).

[2] *See Report and Order*, PR Docket No. 86-404, Amendment of Part 90, Subparts M and S of the Commission's Rules, 3 FCC Rcd 1838 (1988) at paras. 48-49 & n.53.

[3] The same preference scheme applies to both the 800 MHz and the 900 MHz waiting lists. *Id.*

[4] *Report and Order*, PR Docket 85-6, 50 Fed. Reg. 32419, (released August 5, 1985) at paras. 21 and 23; *Second Report and Order*, PR Docket No. 79-191, 47 Fed. Reg. 41002 (September 16, 1982) at para. 208.

[5] 47 C.F.R. § 1.401(e). Section 1.401(e) of the Commission's Rules states "Petitions which are moot, premature, repetitive, frivolous, or which plainly do not warrant consideration by the Commission may be denied or dismissed without prejudice to the petitioner." *See also Protection for Syndicated Programs*, 56 RR 2d 625, 628-29 (1984) (authorizing Commission to dismiss petitions that are moot or repetitive).

[6] 47 C.F.R. § 0.331.

[7] *Report and Order*, 2 FCC Rcd 1825 (1986), para. 85.

[8] *Report and Order*, PR Docket No. 86-404, Amendment of Part 90, Subparts M and S of the Commission's Rules, 3 FCC Rcd 1838 (1988) at para. 49.

[9] Report and Order, supra note 7 at para. 81.

[10] 47 C.F.R. §§ 90.631 and 90.633.

[11] 47 C.F.R. § 90.621. *See also Report and Order*, PR Docket No. 86-160, 2 FCC Rcd 513 (1987).

[12] *See* 47 C.F.R. § 90.609.

[13] 47 C.F.R. §§ 0.331, 1.401 and 1.407.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements for Cost
Support Material To Be Filed
with 1989 Annual Access Tariffs

MEMORANDUM OPINION AND ORDER

Adopted: December 28, 1988; Released: January 9, 1989

By the Chief, Common Carrier Bureau:

1. On December 21, 1988, the Ameritech Operating Companies (Ameritech)[1] filed a motion seeking an extension of time to file certain information that we have required to be filed with their annual access tariff filing which is due December 30. Ameritech requests that it be permitted to file forms COS-7(H) and COS-7(P) on February 1, 1989. For the reasons stated below, we grant Ameritech an extension of time until January 25, 1989. We believe that this should be sufficient time to provide the required data.

2. By an Order in the captioned proceeding, we established requirements for cost support material that local exchange carriers (LECs) must file with their annual access tariff filings.[2] In the *TRP Order*, the Bureau concluded, *inter alia*, that, in order to avoid problems encountered in the 1988 annual access tariff proceeding, LECs would be required to file detailed cost charts for both historical and prospective data. We noted that data provided on a lesser level of detail had proven inadequate for a showing that the LECs' proposed rates are reasonable. To the extent that LECs' ratemaking procedures do not yield data required by the charts contained in the *TRP Order*, we found that we would have no basis on which to evaluate the proposed rates. Finally, we emphasized that, although carriers are free to develop rates using various methods, all methods must yield prospective cost data in conformance with the charts. *TRP Order* at paras. 18-19.

3. On November 1, 1988, Ameritech filed a petition for waiver of certain requirements of the *TRP Order*. In particular, Ameritech requested that it be permitted to file certain cost data at the Class B level of detail described in the Uniform System of Accounts (USOA). We denied Ameritech's petition, and the similar petitions of a number of other LECs, because we concluded that, if we granted their requests, Charts COS-7 and COS-8 would not provide significantly more information than Chart COS-1. We reiterated our conclusion that data provided at a lesser level of detail than required by the *TRP Order* had proven inadequate for the assessment of the carriers' proposed rates. [3]

4. In its motion for extension of time, Ameritech asserts that it has no mechanized system in place to produce the data required by form COS-7(H) and that it cannot complete the tasks necessary to produce the data by the December 30 access tariff filing deadline. In addition, Ameritech states that the prospective data must be derived from historical relationships and that this cannot be accomplished prior to the filing deadline. Ameritech notes that "[a]ll such data developed as input to the Companies' mechanized filing system have been projected at a Class B Manual level of detail." Ameritech Motion for Extension of Time at 3. Accordingly, Ameritech requests that it be permitted to file forms COS-7(H) and COS-7(P) on February 1, 1989.

5. We grant the motion for extension of time in part and direct Ameritech to file the required data not later than January 25, 1989, one week earlier than Ameritech requested. We grant this extension reluctantly. Extensions of time are not routinely granted and, in general, we believe more compelling circumstances should be shown to justify an extension. In this case, it is not clear whether Ameritech exercised due diligence in attempting to compile the necessary data in a timely fashion. We caution all carriers that they should not assume that petitions for waiver of Commission Rules or Orders will be granted. Unless and until a waiver is granted, carriers are under an obligation to comply with all applicable requirements and should proceed accordingly.

6. Nevertheless, because it appears that Ameritech will not now be able to complete Charts COS-7(H) and COS-7(P) by the access tariff filing deadline, we grant Ameritech's request in part. We believe that the January 25 deadline established by this Order will allow Ameritech sufficient time to compile the necessary data without unreasonably compromising the ability of this Bureau's staff and interested members of the public to analyze Ameritech's proposed rates.[4]

7. Accordingly, IT IS ORDERED that the motion for extension of time filed by the Ameritech Operating Companies IS GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] The Ameritech Operation Companies are Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc.

[2] Commission Requirements for Cost Support Material To Be filed by with 1989 Annual Access Tariffs, Da 88-1554, released Oct. 3, 1988 *(TRP Order)*.

[3] Annual 1989 Access Tariff Filings, DA 88-1872, released Dec. 2, 1988 *(Waiver Order)* at paras. 36-38.

[4] We note that Ameritech states its intention to provide data for forms COS-7(H) and COS-7(P) at the Class B level of detail when it makes its annual access tariff filing. Ameritech Motion for Extension of Time at 1. Although, as we have stated repeatedly, these data are not sufficient for review of Ameritech's proposed rated, we do, of course, expect Ameritech to make such an iterim filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re licenses of	KGW 415
New York Telephone	KGW 416
Company	KGW 417
	KGW 418
	KQU 537
	KQU 538
	KQU 539
	KQU 540
	KLU 786
	KZN 548
	KEA 692
	KEA 693

and

Applications of	File Nos. 857039 (KGW 417)
NYNEX Mobile	857040 (KGW 416)
Services Company and	857041 (KGW 415)
New York Telephone	857042 (KEA 693)
Company	857043 (New)
	857044 (KLU 786)
	857045 (KGW 418)
	46-MA-L-108 (KQU 537)
	11-MA-ML-36 (KEA 692)
	2-MA-RL-15 (KQU 539)
	1-MA-RL-15 (KQU 538)
	3-MA-RL-15 (KQU 540)

For Land Radio Stations in the
Maritime Services

MEMORANDUM OPINION AND ORDER

Adopted: December 27, 1988; Released: January 9, 1989

By the Chief, Private Radio Bureau:

I. INTRODUCTION

1. We have before us a pleading entitled "Petition to Revoke or Dismiss" the above-captioned licenses and applications, filed by International Telecharge, Inc. (ITI). NYNEX Mobile Services Company (NMSC) filed an opposition, and ITI filed a reply. For reasons discussed below, we find that the petition raises no substantial and material questions concerning the qualifications of NMSC, its affiliate New York Telephone Company (NYT), or NYNEX Corporation, the parent of both. Therefore, we will dismiss the petition and process NMSC's applications routinely.

II. BACKGROUND

2. Both NMSC and NYT are subsidiaries of NYNEX Corporation. In 1985, NYT and NMSC filed an application for assignment from NYT to NMSC of 28 common carrier radio licenses, including 12 maritime services licenses, for VHF public coast stations and associated marine receiver test stations. The application was filed at the Commission's offices in Washington, D.C. Pursuant to Section 1.912 of the Commmission's Rules, 47 C.F.R. § 1.912, however, applications pertaining to the maritime services should be filed at the Commission's offices in Gettysburg, Pennsylvania.

3. Notwithstanding the mistake in filing, the assignment application covering all 28 licenses was granted April 11, 1985. *See* Letter from Michael Deuel Sullivan to Gerald M. Oscar and Edward R. Wholl (April 11, 1985). Public notice of this action was issued May 8, 1985. NYT and NMSC subsequently effected the *pro forma* transfer and NMSC has been operating the captioned stations ever since. Since that time, one of the public coast station licenses, KZN 548, expired after NMSC failed to file a renewal application. NMSC sought and obtained special temporary authority (STA) to continue to operate that station[1] and filed an application (857043) for a new station at the same site. Additionally, KEA 692, a marine receiver test station (used to test the operation of a public coast station), also expired, and NMSC received STA to continue to operate that station as well.[2]

4. ITI's petition argues that NMSC and/or NYT are not qualified to be licensees because (a) NMSC's operation of the 12 maritime stations has been an unauthorized transfer of control in violation of Section 310(d) of the Communications Act, 47 U.S.C. § 310(d); (b) NMSC's operation of KZN 548 and KEA 692 after their licenses expired constituted unlicensed operation in violation of Section 301 of the Communications Act, 47 U.S.C. § 301; and (c) there are errors in pending applications. NMSC disputes these arguments and characterizes them as frivolous. It also states that ITI had contacted it in the fall of 1987 hoping to buy the maritime stations. NMSC states that it was negotiating to sell the stations to a third party and thus declined to negotiate with ITI. NMSC believes that ITI filed its petition to accomplish indirectly what it could not do directly -- either the third party would withdraw its offer or the licenses would be revoked on the basis of an inadvertent error. NMSC urges that the Commission not permit the regulatory process to be used in this manner. Opposition, 4-6.

III. DISCUSSION

A. *Unauthorized Transfer of Control*

5. ITI argues that NMSC's operation of the maritime stations after the Commission granted its assignment application for those stations was an unauthorized transfer of control. As NMSC notes, however, its operation of the stations was pursuant to Commission authorization. Opposition, 2-3, Ex. I. What ITI seems to be saying is that the Commission's grant of the assignment application was invalid because the application was filed in Washington rather than Gettysburg. This contention is frivolous. The filing of an application for a *pro forma* assignment of a radio license in Washington rather than Gettysburg would not, *ipso facto*, invalidate the subsequent grant of the application on its merits.

B. *Unlicensed Operation*

6. NMSC continued to operate public coast station KZN 548 between the time when its license expired and when it became aware of that fact, at which point it sought an STA. [3] NMSC now states that it has taken steps to assure that it will file timely renewal applications and otherwise follow Commission procedures in the future. Opposition, 10.[4]

7. NMSC's inadvertent failure to obtain a timely renewal of KZN 548 does not warrant further examination of its qualifications under the circumstances presented here. The authorizations for its several other VHF public coast stations are in good order and we have been presented with no information suggesting a tendency toward noncompliance with the Commission's Rules. When it realized there was an irregularity, NMSC took immediate steps to remedy the situation by obtaining an STA and filing an application for a new station. In addition, we note that no one's interest will be hurt by processing NMSC's application for a new station like any other similar application. There is no "waiting list" concept in our regulatory scheme for public coast stations as there is, for example, in some private land mobile radio services. Exclusive assignments are made for public coast stations, but any party can file a competing application that is mutually exclusive with an application for a new station or for renewal.

C. *Errors in Applications*

8. Finally, ITI states there are some deficiencies in the information provided on some of the pending applications. For example, ITI states that NMSC's applications lack a financial showing. Petition, 7-8. No financial showing is needed, however. *See Report and Order*, PR Docket No. 80-144; SS Docket No. 78-145, 48 Fed. Reg. 21583 (1983). We have reviewed ITI's allegations and NMSC's explanations and found the alleged deficiencies to be minor. They will be considered in processing the pending applications and have no bearing on NYT's or NMSC's qualifications to be a licensee.

IV. DECISION

9. In view of the discussion above, we find that ITI's petition raises no substantial and material questions concerning the qualifications of NYT, NMSC or NYNEX Corporation to hold radio station licenses. NMSC's pending applications will therefore be processed in the normal course of business.

10. IT IS THEREFORE ORDERED that the Petition to Revoke and Dismiss filed by ITI IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] Telegram from Marcus D. Stevens to NYNEX Mobile Services Co. (February 11, 1988).

[2] Telegram from Marcus D. Stevens to NYNEX Mobile Services Co. (February 11, 1988).

[3] Although the record is not clear on this point, NMSC may also have made occasional transmissions over marine receiver test station KEA 692 between the time its license expired and when it received an STA.

[4] The failure to seek timely renewal of the licenses for KZN 548 and KEA 692 was negligent, but not disqualifying. *See, e.g., Minority Broadcasters of East St. Louis, Inc.*, 99 FCC 2d 264 (Rev. Bd. 1984).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

John Staurulakis, Inc.

Petition for Clarification
Regarding Applicability of
Small Company Tariff Filing
Rules to Subscriber Line
Charge Tariff Filings

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1988; Released: December 12, 1988

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. John Staurulakis, Inc. (JSI) filed a petition on behalf of several client telephone companies on August 10, 1988, seeking clarification and, if necessary, a waiver of Section 61.39 of the Commission's Rules, 47 C.F.R. § 61.39.[1] JSI's clients seek to use historical cost and demand data to support their subscriber line charge tariff filings. We subsequently established a pleading cycle inviting comments on whether JSI's petition should be granted.[2] Comments were filed on October 20, 1988, by the United States Telephone Association (USTA), the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO), and the National Telephone Cooperative Association (NTCA).

II. SUMMARY OF PLEADINGS

A. *JSI Petition*

2. Section 61.39 allows small companies wishing to file their own access tariffs to develop certain rates on an historical basis. JSI notes that, while Section 61.39 does not explicitly state that small companies may develop only traffic sensitive (TS) rates on an historical (rather than a prospective) basis, the original Notice of Proposed Rule Making [3] which was the genesis of Section 61.39 mentions only TS rates. Because the small companies represented seek to file their own tariffs with subscriber line charges developed on an historical basis, those companies seek clarification of the applicability of Section 61.39. Should the Bureau decide that the small company provision in Section 61.39 is limited to filings containing TS rates, these three companies request a waiver of Sections 61.38 and 61.39 to allow them to file their subscriber line charges according to the small company provision in Section 61.39.[4]

B. *Comments*

3. All of the comments filed in this proceeding support either an interpretation of Section 61.39 which allows the use of historical data in developing subscriber line charges, or in the alternative, granting the JSI client companies a waiver allowing them to do so. Commenters offer four basic arguments in support of JSI. First, USTA and OPASTCO assert that the current situation of allowing historical data for TS rates, but requiring prospective data for subscriber line charge, does not provide the least burdensome or most cost efficient means of filing tariffs.[5] In addition, USTA argues that without a waiver of Sections 61.38 and 61.39, small companies will not be able to benefit from the rules promulgated in the CC Docket 86-467 proceedings.[6] Commenters also contend that granting the waiver would further the Commission's goal of streamlining regulatory burdens on small telephone companies.[7] Finally, the commenters assert that small local exchange carriers (LECs) do not have the market power to abuse the use of historical data to support tariff filings.[8]

III. BACKGROUND

4. On December 12, 1986, the Commission released the *Notice* as a result of proposals made in a petition filed by USTA.[9] In its petition, USTA requested that the Commission institute a Rule Making proceeding to reduce the administrative and regulatory burdens on small telephone companies. Specifically, USTA requested that the Commission declare small LECs non-dominant with respect to their TS access tariffs and accord them the streamlined regulation applicable to non-dominant carriers. That is, the tariff filings would be presumptively lawful, could be filed on 14 days' notice, and need not be supported by extensive economic support data.[10]

5. At the time the USTA petition was filed, small LECs could avoid all direct access tariff filings by participating in the National Exchange Carrier Association (NECA) pools. Those carriers also had the option of filing individual access tariffs for TS rates.[11] Many small LECs, however, argued that they could not take advantage of the latter option because the administrative costs of doing so were prohibitive.[12] Hence, USTA urged the Commission to ease some of the administrative burdens associated with filing individual TS tariffs.

6. In the *Notice*, the Commission expressed its goal to decrease the small LECs' costs by eliminating unnecessary direct regulatory burdens affecting them. The Commission warned, however, that this goal is tempered by its statutory mandate "to make available, so far as possible to all people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communications service with adequate facilities at reasonable charges . . . ."[13] Therefore, the Commission ruled that any proposal for streamlined regulations for small LECs would have to meet a two-part test. First, the proposal would have to be "rate neutral" -- any changes in rates that would occur as a result of such proposal must not affect the reasonableness of the rates.[14] Second, the proposal must be "pooling neutral" -- the proposal must neither encourage nor discourage small LEC participation in the NECA pool.[15]

7. The Commission decided in the *Small Company Order* that small LECs, *i. e.*, carriers with 50,000 lines or less per study area, could use historical cost and demand data to develop TS rates. The Commission concluded that the use of historical data would be rate neutral because it would be self-correcting over time and "current actuals

would be used in subsequent periods to set rates."[16] Furthermore, the Commission found that use of such data would not affect a carrier's decision to join or withdraw from NECA.[17] Finally, the Commission determined that tariff filings developed with such data would be presumptively valid and would not be suspended or rejected absent a showing that the rates are unreasonable, that there is not a practical or sufficient opportunity to correct the unreasonable rates, and that irreparable injury would result from such rates.[18]

IV. DISCUSSION

8. The first issue we must consider is whether the *Small Company Order* is limited to TS tariff filings. In our view, it is clear that the provisions adopted in that Order are limited to TS rates. The JSI petition itself acknowledges language in the *Small Company Order* which indicates that the use of historical cost and demand data is only applicable to TS tariff filings.[19]

9. In addition, footnote 37 of the *Small Company Order* confirms that the Commission expected to consider any changes in common line filing requirements in a separate proceeding. The Commission decided to establish a January 1, 1989, implementation date for filing the first tariffs under the new rules. Footnote 37 observed that:

> This schedule will also allow us to consider application of the principles and rules adopted in this Order to the Common Line pool, which is scheduled to be changed from a mandatory to a voluntary pool in 1989.[20]

10. We believe that if the Commission had intended to allow small LECs to use historical cost and demand data to support tariff filings other than for TS rates, it would have explicitly said so. Hence, it would be inappropriate to extend the scope of the rule changes adopted in the *Small Company Order*. Rather, just as a separate Rule Making proceeding was established to ease regulatory burdens as to TS tariff filings, a separate Rule Making proceeding would be required to extend the *Small Company Order* provisions to other types of small LEC tariff filings.

11. The second issue we must consider is whether JSI has demonstrated sufficient cause to warrant our granting a waiver of Sections 61.38 and 61.39. We believe that JSI has failed to do so. JSI has not presented any special circumstances which demonstrate that its client companies are unduly burdened by the current rules. Furthermore, our refusal to grant a waiver will not deprive small companies of the benefits of the streamlining rules since, as those rules currently stand, the benefits are explicitly limited to TS rates and had nothing to do with CCL rates. Moreover, the Commission in the past has not accepted small LEC assertions regarding their limited market power, and we find no basis here for concluding that the absence of market power is an empirically supportable premise for concluding that small LECs should be permitted to use historical data for their subscriber line charges filings.[21] Finally, while JSI and its supporting commenters are correct in asserting that the Commission is dedicated to the policy of lessening regulatory burdens on small LECs, they all fail to recognize that the Commission has emphasized that this policy must be moderated by its duties under the Communications Act.

V. CONCLUSION AND ORDERING CLAUSE

12. In sum, we believe that Section 61.39 of the Commission's Rules is not applicable to subscriber line charge filings. Nor do we believe that JSI has adequately demonstrated that its client companies are unduly burdened by having to submit prospective cost and demand data to support their subscriber line charge filings. Accordingly, JSI's petition will be denied in both respects.

13. IT IS THEREFORE ORDERED, that the petition for waiver filed by John Staurulakis, Inc., on behalf of Dunkirk and Fredonia Telephone Company, Pineland Telephone Co-op, Warwick Valley Telephone of New Jersey, Warwick Valley Telephone of New York, and Urban Telephone Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] The original companies represented were Dunkirk and Fredonia Telephone Company, Pineland Telephone Co-op, Warwick Valley Telephone Company of New York, Warwick Valley Telephone Company of New Jersey, and Urban Telephone Corporation. The two Warwick Valley telephone companies have withdrawn from this proceeding by a petition filed on October 11, 1988.

[2] *See* Petition for Clarification Filed Regarding Applicability of Small Company Tariff Filing Rules to Subscriber Line Charge Tariff Filings, Public Notice, DA 88-1570, released Oct. 5, 1988.

[3] *See* Regulation of Small Telephone Companies, CC Docket No. 86-467, Notice of Proposed Rule Making, 1 FCC Rcd 1206, 1207, 2 FCC Rcd 1010, 1011 (1986) (*Notice*).

[4] Since the JSI petition is limited to the issue of subscriber line charge filings, this Order only addresses that issue.

[5] *See* USTA Comments at 2; OPASTCO Comments at 3.

[6] *See* USTA Comments at 2, *citing* Regulation of Small Telephone Companies, CC Docket No. 86-467, Report and Order, 2 FCC Rcd 3811 (1987) (*Small Company Order*).

[7] *See* OPASTCO Comments at 2-3; NTCA Comments at 2.

[8] *See* USTA Comments at 2-3; NTCA Comments at 2 n.3.

[9] *See* note 3, *supra*.

[10] *Notice*, 1 FCC Rcd at 1206, 2 FCC Rcd at 1010.

[11] *See Small Company Order*, 2 FCC Rcd at 3811.

[12] *Id.*

[13] *See Notice*, 1 FCC Rcd at 1208, 2 FCC Rcd at 1012, *citing* Section 1 of the Communications Act, 47 U.S.C. § 151.

[14] *Notice*, 1 FCC Rcd at 1208, 2 FCC Rcd at 1012.

[15] *Id.*

[16] *Small Company Order*, 2 FCC Rcd at 3812.

[17] *Id.*

[18] *Id.* at 3812-13.

[19] JSI Petition at 2, *citing Small Company Order*, 2 FCC Rcd at 3811.

[20] *Small Company Order*, 2 FCC Rcd at 3819.

[21] *See Notice*, 1 FCC Rcd at 1210, 2 FCC Rcd at 1014.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

Richard R. Zaragoza

For Declaratory Ruling

DECLARATORY RULING

Adopted: December 23, 1988; Released: December 27, 1988

By the Chief, Fairness/Political Programming Branch:

1. The Commission has before it a request for declaratory ruling, filed by Richard Zaragoza, Esquire, on behalf of three state broadcaster associations, concerning the effect, if any, of Noncommercial Sustaining Announcement plans (NCSAs), upon a broadcast station's "lowest unit charges" (LUC), as specified in Section 315(b) of the Communications Act [47 U.S.C. Section 315(b)]. The request also asks the Commission to declare that NCSA plans have no impact upon a station's "comparable rates," the rates required for legally qualified candidates during election periods prior to the 45 and 60 day LUC pre-election periods.

2. The request states that NCSAs involve contributions to state broadcaster associations in return for which an association coordinates the airing, on member stations, of "public service oriented" announcements on behalf of the contributing entity. The request indicates that NCSA contributions are used by the associations to defray general operating expenses or are used to reimburse the associations for non-broadcast assistance provided to non-profit organizations. Participating member stations may benefit directly through reduction, or elimination, of membership dues. Otherwise, member stations benefit indirectly by enhancing the revenue of their state associations. The request also notes that contributors to NCSAs are not guaranteed a precise number of announcements, nor are they guaranteed that any particular station will air them. Furthermore, a participating member station has no way of calculating how much NCSA revenue will eventually be used to its benefit, direct or otherwise. In short, according to the request, there is an absence of predictability for both the contributor and the member station in terms of exactly what amount can be attributed by a member station to a given NCSA announcement.

3. The question raised by the request is whether, in computing their respective LUC's, member stations must take into consideration monies contributed to their state association under so-called NCSAs when a member station chooses to broadcast announcements pursuant to NCSA plans. Based on the reasons discussed below, we have determined that NCSAs should have no effect on a broadcast station's LUC or comparable rate calculations. This finding was conveyed to Mr. Zaragoza by telephone on October 14, 1988.

4. Section 315(b)(1) of the Communications Act directs broadcasters to charge legally qualified candidates for public office "the lowest unit charge" (LUC) of the station for the same class and amount of time for the same period during the 45 days preceding a primary election, and the 60 days preceding a general or special election. Outside the specified LUC pre-election periods, a station may charge legally qualified candidates as much as it charges others for "comparable use" of the station [47 U.S.C. Section 315(b)(2)]. In amending Section 315 in 1972 to include LUC, Congress intended to decrease campaign expenditures by placing political advertisers on par with a station's "most favored commercial advertiser." S. Rep. No. 96, 92d Cong., 1st Sess., p. 27 (1971).

5. In 1981, the Commission ruled that "per inquiry" advertising (a station carrying a per inquiry ad is paid in direct relationship to the number of sales inquiries generated by an ad campaign) is not subject to LUC because the broadcaster has no way of calculating before the fact what it will receive as compensation. *Robert B. McKenna*, 87 FCC 2d 1016 (B/c Bur. 1981). That ruling stated, "[t]he amount received for per inquiry announcements is impossible to predict and in many respects is outside the control of the broadcaster." Similarly, NCSAs accord no certainty of how many announcements will be aired by a particular station, or if NCSA announcements are aired, how much the participating station will receive. Here, as in per inquiry advertising arrangements, the cost of each announcement is beyond calculation at the time a contributor pays the state association and the ultimate benefit to the station is unknown to the station and appears to be essentially beyond its control.

6. We also take note of the public-oriented goals of NCSA announcements. In the past, the Commission has indicated that discount rates or bonus spots provided for non-profit advertising are outside the scope of Congress' desire to place candidates on a par with a station's "most favored *commercial* advertiser." *See KGWA*, 34 FCC 2d 1103 (B/C Bur. 1972); *Korral Radio, Inc.*, 34 FCC 2d 531 (B/c Bur. 1974); *M. Robert Rogers*, 38 RR 2d 875 (B/c Bur. 1976). Therefore, in addition to the absence of certainty inherent in NCSAs, the public service orientation is further justification for our finding that NCSA plans should not be factored in calculating lowest unit charges. Accordingly, NCSA's as described in this request may be excluded from LUC considerations. The same rationale is applicable to the "comparable rates" period request and, thus, NCSA's should have no effect upon those rates.

7. Staff action is taken here pursuant to delegated authority.

FEDERAL COMMUNICATIONS COMMISSION

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-558

In re Applications of

COMMUNITY BROADCASTING FOUNDATION, INC. (hereafter Community) — File No. BPED-870910MP

KNIGHT RADIO, INC. (hereafter Knight) — File No. BPH-870917MB

ROCHESTER BROADCASTING CORPORATION (hereafter RBC) — File No. BPH-870918MD

VICTORSON GROUP, INC. (hereafter Victorson) — File No. BPH-870918MF

EISON AND ASSOCIATES, LIMITED (hereafter Eison) — File No. BPH-870918MJ

R. B. LEE RUST (hereafter Rust) — File No. BPH-870918MQ

UPSTATE FM LIMITED PARTNERSHIP (hereafter Upstate) — File No. BPH-870918NB

AGAPE RADIO, INC. (hereafter Agape) — File No. BPH-870918ND

TAYLOR COMMUNICATIONS OF ROCHESTER (hereafter Taylor) — File No. BPH-870918NE

CHRISTIAN DISCERNER, INC. (hereafter Discerner) — File No. BPED-870918NG

DONALD B. CRAWFORD (hereafter Crawford) — File No. BPH-870918NJ

DOLORES BOYD d/b/a LAKE BROADCASTING (hereafter Lake) — File No. BPH-870918NM

BEST BROADCASTING COMPANY, L.P. (hereafter Best) — File No. BPH-870918NN

SPACECOM, INC. (hereafter SpaceCom) — File No. BPH-870918NO

For a Construction Permit for
a New FM Station on Channel 290A,
in Rochester, New York.

HEARING DESIGNATION ORDER

Adopted: November 25, 1988; Released: January 10, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* Discerner and Lake both request a waiver of 47 C.F.R. § 73.207, which governs the spacing between stations. Discerner and Lake are both short-spaced to CHRE(FM), St. Catherines, Ontario, Canada. The instant allotment for Rochester, New York is for Channel 290A. CHRE(FM) operates on first adjacent Channel 289B. The required minimum separation between a Class A station and a first adjacent Class B station is 132 kilometers. *See* 47 C.F.R. § 73.207 and *Working Arrangement for the Allotment and Assignment of FM Broadcasting Channels 201-300 Under the Canadian - U.S. FM Broadcasting Agreement of 1947* (Adopted September 7, 1984) (Working Arrangement). Discerner's proposed transmitter site is 131.6 kilometers from the transmitter for CHRE(FM), which results in short-spacing of .4 kilometers. Lake's proposed transmitter site is 130.07 kilometers from the transmitter for CHRE(FM), which results in short-spacing of 1.93 kilometers. In support of its waiver request, Discerner states that: 1) when rounded to the nearest kilometer, in accordance with 47 C.F.R. § 73.208(c)(7), the distance between its proposal and CHRE(FM) is 132 kilometers, in compliance with 47 C.F.R. § 73.207; 2) the Canadian-United States FM Broadcasting Agreement of 1947 provides for routine short-spacings of 5 miles or less, like the short-spacing in its proposal; and 3) the first adjacent interfering contour proposed falls entirely within U.S. territory, in compliance with the Working Arrangement. Lake states that while the actual spacing between its proposal and CHRE(FM) is 130.07 kilometers, the spacing between its proposal and the nearest point on Canadian land is 83 kilometers, well beyond the 100 u v/m interference contour of its proposal. Therefore, Lake argues that its waiver request is justified because the service contours of a foreign station are not protected within U.S. territory.

3. Both the *Working Arrangement* and Commission rules allow the distance separating the proposal and an existing station to be determined to the nearest kilometer. *See Working Arrangement* at Section 2-6-2-6; 47 C.F.R. § 73.208(c)(7). Therefore, application of the rounding principle results in a computation of the distance between Discerner's proposed transmitter and the CHRE(FM) transmitter as 132 kilometers, which fully complies with the required minimum distance separation set out in

Commission rules and the *Working Arrangement*. Accordingly, Discerner's waiver request will be dismissed as moot.

4. The *Working Arrangement* also allows the Commission to submit the technical data of any applicant short-spaced to a Canadian FM broadcast facility to the Canadian Department of Communications for clearance; therefore, an application short-spaced to a Canadian facility may be designated for hearing if the Canadian government has no objection and the Commission finds no objectionable interference within the United States. With respect to Lake's waiver request, the Canadian government cleared Lake's proposed site on July 25, 1988. Additionally, engineering study of Lake's proposal revealed that no unacceptable interference would be caused by or received by Lake. Finally, the interfering contour of Lake's proposal does not lie over Canada. Accordingly, Lake's waiver request will be granted.

5. Rust requests a waiver of 47 C.F.R. § 73.315 which requires that applicants provide a 3.16 mV/m (70 dBu) signal to the entire proposed city of license. The FM Branch does not require waiver of this provision unless the proposed 70 dBu coverage falls below 80% of the area of the proposed city of license. *See, e.g., John R. Hughes*, 50 Fed. Reg. 5679 (Feb. 11, 1985). Engineering study reveals that Rust's proposal provides the requisite coverage to more than 80% of the principal community. Consequently, Rust's waiver request will be dismissed as moot.

6. *Radio Frequency Radiation*. Victorson, Eison, Agape, Taylor, Crawford and Best propose to side-mount their respective antennas on the existing tower shared by Stations WHEC(TV), WROC(TV), WPXY(FM), WCMF(FM) and WKLX(FM). Knight proposes to locate on a tower immediately adjacent to this multi-station facility. Lake proposes to mount its tower atop the Midtown Tower Building, Broad Street at Clinton Avenue, Rochester, New York. Engineering study indicates that each of these proposals may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Knight, Victorson, Eison, Agape, Taylor, Crawford, Lake and Best may have failed to comply with the newly revised environmental criteria set forth in the *Report and Order* in General Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986)[1] Under the newly revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in the newly added 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the criteria at 47 C.F.R. § 1.1307, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since the proposals of Knight, Victorson, Eison, Agape, Taylor, Crawford, Lake, and Best may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, these applicants will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. This study, in Lake's case, must describe proposed protections for humans exposed to RF radiation on the roof and in the building itself. In addition, if the sites proposed by Knight, Victorson, Eison, Agape, Taylor, Crawford, and Best are presently fenced in compliance with the guidelines, the applicants are required to so state and give the distance from the base of the tower to the fence. Accordingly, Knight, Victorson, Eison, Agape, Taylor, Crawford, Lake, and Best will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

7. *Tower Height Discrepancies*. Victorson, Eison, Agape, Taylor, Crawford and Best propose to side-mount their respective antennas on the existing tower shared by Stations WHEC(TV), WROC(TV), WPXY(FM), WCMF(FM) and WKLX(FM). The tower data submitted in Section V-B of FCC Form 301 (October 1986) in the applications of Victorson, Eison, Agape, Taylor Crawford and Best, however, is inconsistent with that contained in the Commission's records. In Item 7, Section V-B of FCC Form 301, Victorson lists the overall height above ground level (AGL) of the existing tower at 105 meters and the overall height above mean sea level (AMSL) of the tower as 312.7 meters. In the same item in Section V-G of FCC Form 301, the following applicants also list data inconsistent with that contained in Commission records: Eison lists the existing tower as 106 meter AGL and 313 meters AMSL; Agape lists the existing tower as 107 meters AGL and 314 meters AMSL; Taylor lists the existing tower as 106 meters AGL and 313 meters AMSL; Crawford lists the existing tower as 107 meters and AGL and 314 AMSL; and Best lists the existing tower as 107 meters AGL and 313 AMSL. Commission records indicate that the existing tower is cleared for heights of 105.2 meters AGL and 310.3 meters AMSL. Because Victorson, Eison, Agape, Taylor, Crawford and Best propose to locate on an existing tower licensed to existing Commission licensees and because specific reference is made to the existing tower in the applications in question, the staff could accurately verify the pertinent tower heights by taking official notice of the tower parameters found in the Commission's records for the licensed facilities. Accordingly, these applications are acceptable for filing. However, an air hazard issue will be specified below, concerning which Victorson, Eison, Agape, Taylor, Crawford and Best must either file amendments correcting the tower heights listed in their respective proposals, or submit documentation to establish that the heights specified are, in fact, correct and the Commission's and FAA's records are in error.

8. *City Coverage*. Community proposes to operate a non-commercial educational FM station on the instant commercial allocation; therefore, Community submitted its application on FCC Form 340. By staff letter of April 21, 1988, Community's application was returned as inadvertently accepted for tender because it failed to include the distance to the 70 dBu (3.16 mV/m) contour and to plot the 70 dBu (3.16 mV/m) contour on its contour map. However, on May 4, 1988, on its own motion, the staff rescinded its letter of April 4, 1988 and reinstated Community's applications because FCC Form 340 does not require applicants to provide the distances to the 70 dBu contour or plot the 70 dBu contour. Nevertheless, Com-

munity must comply with 47 C.F.R § 73.315 by demonstrating that it provides a 70 dBu signal to at least 80% of the proposed city of license, because the Commission has made it clear that the requirements of 47 C.F.R. § 73.315 apply to non-commercial educational applicants applying for nonreserved commercial allocations. *See Report and Order*, 52 Fed. Reg. 10569 (April 2, 1987). *See also, John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). Accordingly, an appropriate city coverage issue will be specified and Community also will be required to submit an amendment to the presiding Administrative Law Judge within 30 days of the release of this order, plotting the 70 dBu contour on its site map, showing the distances to the 70 dBu contour and indicating whether it provides the coverage required by 47 C.F.R. § 73.315.

9. In response to Section V-B, Item 11 of FCC Form 301 (October 1986), Taylor's application, as amended on January 21, 1988, indicates that its proposed facility will not satisfy the requirements of 47 C.F.R. § 73.315(a), (b). However, Taylor fails to request a waiver or present a justification for its failure to comply with this rule. Accordingly, an appropriate city coverage issue will be specified.

10. Victorson has disclosed that its principal Kathleen McGraw is "currently employed in a management level position at a broadcast station in Rochester." *See* Victorson's application at Exhibit 1. Victorson, however, fails to specify the station at which Ms. McGraw is employed and to provide information concerning Ms. McGraw's job title and responsibilities. Victorson has indicated that Ms. McGraw will terminate her employment with the Rochester station if the subject application is granted. Because Ms. McGraw's employment presents a potential violation of the Commission's cross-interest policy, Victorson will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order providing the call sign and service of the broadcast station at which Ms. McGraw is employed as well as Ms. McGraw's job title and a description of her responsibilities at the station. *See Reexamination of the Commission's Cross - Interest Policy*, 2 FCC Rcd 3699 (1987). Upon evaluation of the required amendment, the Administrative Law Judge will specify a divestiture condition, if appropriate.

11. It its response to Section III of FCC Form 301 (October 1986), Eison indicates that it is presently unable to certify that it is financially qualified, but that its financial proposal is being formulated. Accordingly, an appropriate financial issue will be specified below.

12. Taylor amended its application on January 21, 1988, after the time for filing minor amendments as of right had expired. The amendment corrected a typographical error in the tabulation of the height above average terrain. The amendment is accepted because the defect in Taylor's proposal created by the typographical error did not cause the applicant's facilities to exceed the maximum height for a Class A station. Therefore, Taylor's application, as originally filed, was acceptable for filing, and the amendment is accepted in accordance with 47 C.F.R. § 1.65.

13. Taylor has amended its application to disclose that a subsidiary of J.J. Taylor Companies, Inc., which is owned and controlled by its principals John J. Taylor, Jr., Lillian M. Taylor and John J. Taylor III, has been named the defendant in age discrimination litigation, *Albert C. Haik v. J. J. Taylor Distributing Company, d/b/a East Side Beverage Company*, pending before both the Minnesota Department of Human Rights (MDHR) and the Equal Employment Opportunity Commission (EEOC). MDHR Charge No. E 15572-MA5-2C; EEOC Charge No. 265-87-1259. J.J. Taylor Companies, Inc. has also been named the defendant in *Lynn Sylvia v. J. J. Taylor Companies, Inc.*, Civil Action No. 87-0669, a breach of contract suit filed by a former employee which is pending in Massachusetts state court. Accordingly an appropriate condition will be specified below.

14. *Parties to the Applicant.* In response to Section II, FCC Form 301, SpaceCom has disclosed that Donald McNulty and H.G. McNulty, Jr. are each the beneficial owners of 45.5% of the stock of Space Center Inc., the parent company of the applicant. This stock is held in a voting trust and voted by the trustees: W.E. Barsness; M.W. McDonald; and S.W. Richey. SpaceCom however, has failed to disclose the ownership and control of the remaining 9% of its parent's stock. Accordingly, SpaceCom will be required to amend its response to Section II to provide the required information concerning parties to the applicant.

15. In response to Section II, Item 10(b) of FCC Form 301 (October 1986), SpaceCom disclosed that its subsidiary KOSO, Inc. has been named the defendant in an employment discrimination claim filed by a former employee, Lupe Quirova Garza, which is pending before the Equal Employment Opportunity Commission (EEOC). *See* Exhibit 2 of SpaceCom's application. SpaceCom also amended its application on October 4, 1988 to report that an age discrimination complaint, FEP 88-89 C6-0141AE, was filed against KOSO, Inc. by former employee Ann Vera Goodwin, with the Department of Fair Employment and Housing of the State of California. The amendment also states that this complaint also was filed with the EEOC. SpaceCom has failed to give all the information required by Item 10(b), Section II concerning each of these pending discrimination claims, *viz.*, identification of the proceedings pending before the EEOC by date and file number. Accordingly, SpaceCom will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order which provides the required information for each claim pending before the EEOC. Additionally, an appropriate condition will be specified below, which may be modified by the presiding Administrative Law Judge to include the relevant identification of the litigation pending before the EEOC upon receipt of the required amendment.

16. In response to Section VI, FCC Form 301, the applicants below have indicated that they will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396(A), the 5-point Model EEO Program. The EEO programs submitted by the following applicants are incomplete or are otherwise deficient in the manner described below. Accordingly, each applicant listed will be required to file an amended EEO Program with the presiding Administrative Law Judge within 30 days of the release of this Order.

APPLICANT	DEFICIENCIES
Knight	Failed to identify specific sources of recruitment specializing in women candidates.
Crawford	Failed to identify specific sources of recruitment specializing in women candidates. Failed to identify specific publications which will be used to attract women and minority candidates.

17. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Knight	July 21, 1988; September 12, 1988; October 19, 1988
RBC	October 11, 1988
Victorson	May 27, 1988
Taylor	January 21, 1988; March 11, 1988; March 18, 1988; May 3, 1988; June 17, 1988
SpaceCom	January 29, 1988; March 4, 1988; July 26, 1988; August 5, 1988; September 19, 1988; October 4, 1988

18. Attempts to obtain the Federal Aviation Administration (FAA) clearance through the Commission's Antenna Survey Branch and the following applicants have been unsuccessful. Accordingly, because no determination has been received as to whether the antenna proposed by these applicants would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding. APPLICANTS: Upstate, Lake.

19. Section II, Item 4 of the FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Victorson and Agape have not completed Item 4 correctly. Victorson's application fails to give a street number for the residence of its principal Vincent Micciche, Jr. Agape's application gives a post office box number as the residence address of its principal John R. Walker, Jr. Accordingly, Victorson and Agape must submit amendments which give all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

20. Community, a non-profit corporation proposes to operate a noncommercial educational FM station on the instant commercial allocation. Section II, Item 4 of FCC Form 340 (May 1985) requires that a corporate applicant specify the names and residence addresses (number, street, city, state) of all officers, directors and members of the governing board. Community has not completed Item 4 correctly. Community lists the members of its Board of Directors but fails to give the street number of the residential addresses of its directors: Thomas A. Haight; Marian B. Haight; and Charles Foster. Accordingly, Community will be required to submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

21. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Knight, Victorson, Eison, Agape, Taylor, Crawford, Lake and/or Best in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether the proposals of Community and Taylor would provide coverage of the city sought to be served, as required by 47 C.F.R. § 73.315(a), and if not, whether circumstances exist which warrant waiver of that Section.

3. To determine whether there is a reasonable possibility that the tower height and location proposed by Victorson, Eison, Upstate, Agape, Taylor, Crawford, Lake, and/or Best would constitute a hazard to air navigation.

4. To determine with respect to Eison whether the applicant is financially qualified.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

22. IT IS FURTHER ORDERED, That for the reasons set forth in paragraph 3 hereinabove, Discerner's request for waiver of 47 C.F.R. § 73.207 IS DISMISSED AS MOOT.

23. IT IS FURTHER ORDERED, That for the reasons set forth in paragraph 4 hereinabove, Lake's request for waiver of 47 C.F.R. § 73.207 IS GRANTED.

24. IT IS FURTHER ORDERED, That for the reasons set out in paragraph 5 hereinabove, Rust's request for waiver of 47 C.F.R. § 73.315 IS DISMISSED AS MOOT.

25. IT IS FURTHER ORDERED, That in accordance with paragraph 6 hereinabove, Knight, Victorson, Eison, Agape, Taylor, Crawford, Lake and Best shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

26. IT IS FURTHER ORDERED, That Victorson, Eison, Agape, Taylor, Crawford and Best shall submit an amendment in accordance with paragraph 7 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

27. IT IS FURTHER ORDERED, That Community shall submit an amendment in accordance with paragraph 8 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

28. IT IS FURTHER ORDERED, That Victorson shall submit an amendment in accordance with paragraph 10 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

29. IT IS FURTHER ORDERED, That SpaceCom shall submit an amendment in accordance with paragraphs 14 and 15 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

30. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to Taylor as a result of this proceeding, its grant shall be without prejudice to whatever action, if any, the Commission may deem appropriate in light of: (i) *Albert C. Haik v. J. J. Taylor Distributing Company, d/b/a East Side Beverage Company*, MDHR Charge No. E 15572-MA5-2C; (ii) *Albert C. Haik v. J. J. Taylor Distributing Company, d / b / a East Side Beverage Company*, EEOC Charge No. 265-87-1259; or (iii) *Lynn Sylvia v. J. J. Taylor Companies, Inc.*, Civil Action No. 87-0669 (Bristol County Superior Court, Commonwealth of Massachusetts).

31. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to SpaceCom as a result of this proceeding, its grant shall be without prejudice to whatever action, if any, the Commission may deem appropriate in light of: *(i) Lupe Quirova Garza v. KOSO, Inc.*, now pending before the EEOC; and *(ii) Ann Vera Goodwin v. KOSO, Inc.*, FEP 88-89 C6-0141AE before the Department of Fair Employment and Housing, State of California and also pending before the EEOC.

32. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Knight and Crawford shall submit Section VI information in accordance with the requirement of 47 C.F.R. § 73.2080(c) to the presiding Administrative Law Judge.

33. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Knight, RBC, Victorson, Taylor and SpaceCom ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

34. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

35. IT IS FURTHER ORDERED, That Victorson and Agape shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

36. IT IS FURTHER ORDERED, That Community shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 340, to the presiding Administrative Law Judge within 30 days of the release of this Order.

37. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

38. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

39. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 U.S.C. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Although Lake stated that using best case calculations, it would comply with the ANSI standard, Lake failed to include in its application specific description of its antenna design. Therefore, a best case calculation cannot be assumed.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements for Cost
Support Material To Be Filed by
Tier 2 Companies with 1989
Annual Access Tariffs

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 1988; Released: December 22, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. By an Order in the captioned proceeding, we established requirements for basic cost and demand information to be filed by all Tier 2 local exchange carriers (LECs).[1] Tier 2 LECs are those companies that have total company annual regulated revenue of less than $100 million as determined by the 1984 Annual Statistical Volume II of the USTA Statistical Reports of Class A and B Telephone Companies for the year 1983, and that file their own access tariffs with the Commission. In this Order, we address various petitions filed by Tier 2 companies.

II. PETITIONS

2. We have received petitions from three Tier 2 companies. Telephone Utilities Exchange Carrier Association (TUECA) notes that the *Tier 2 TRP Order* granted an earlier petition for waiver that it filed requesting that it be allowed to file cost support information at a Tier 2B level of detail for each of its study areas in which it serves fewer than 50,000 access lines. By the instant petition for waiver, TUECA renews its request made in its first petition for waiver to be permitted to file the less detailed Tier 2B cost support information for Telephone Utilities of Washington (TUW), which serves more than 70,000 access lines. TUECA Petition for Waiver at 2.

3. TUECA states that filing cost support information for TUW in the more detailed Tier 2A format will cause inordinate administrative hardship. Once TUECA establishes a Tier 2B procedure for its members, TUECA states, it will be more efficient to complete and submit comparable TRP information for each of its companies. In addition, TUECA asserts, interexchange carriers (ICs) have recommended that TUECA file consistent TRP data for its member companies in order to facilitate comparison among TUECA companies and with other companies. *Id.* at 2-3.

4. United Telephone Company of the Northwest (United) requests reconsideration of our denial of its petition for waiver in the *TRP Waiver Order*.[2] United seeks waiver of Section 36.125(f) of the Commission's Rules, 47 C.F.R. § 36.125(f), to permit it to use a weighting factor of 1.0 to the 1988 interstate Dial Equipment Minutes (DEM) in Oregon instead of the 2.0 weighting factor required by the Rules. United Petition for Waiver at 1. United argues that requiring it to use the 2.0 weighting factor, which will result in a higher allocation of Central Office Equipment (COE) Category 3 investment to the state jurisdiction, will have a unique and deleterious effect on it. United projects that in 1991, it will, by virtue of ordinary growth, surpass the 50,000 line threshold established in Section 36.125 for use of the 2.0 DEM weighting factor. As a result, United contends, it will experience a large shift in revenue requirement to the intrastate jurisdiction in that year. United argues that using the 1.0 weighting factor throughout the ongoing transition to the DEM allocator will make this shift more gradual. *Id.* at 2-3.

5. Finally, Roseville Telephone Company (Roseville) has filed an application for special permission seeking waiver of various sections of the Commission's Rules. Roseville intends to file its own access tariff containing traffic sensitive rates and regulations. Roseville will continue to concur in other portions of the National Exchange Carrier Association (NECA) tariff. Roseville Application for Special Permission, filed Nov. 1, 1988, at 1.

6. We have already granted Roseville's application in part.[3] We indicated at that time that certain of Roseville's requests would be addressed later. Specifically, Roseville seeks waiver of Section 69.3(a) of the Commission's Rules, 47 C.F.R. § 69.3(a), to the extent required to permit it to delete certain tariff language contained in NECA's tariff which does not apply to services currently offered by Roseville.[4] As the partial grant of Roseville's application noted, Roseville will need a waiver of Section 69.3(a) in order to make text modifications for purposes of clarification. Finally, Roseville seeks waiver of the requirement that petitions for waiver of cost support requirements be filed by November 1, 1988.[5]

III. DISCUSSION

7. We grant Roseville's petition but deny the petitions of TUECA and United. As TUECA notes, it requires a waiver of the Commission's Rules in order to be allowed to file cost support data for some of its companies at the Tier 2B level of detail. TUW, which serves more than 70,000 access lines, is not eligible to file as a small company. We see no reasonable basis on which to allow TUW to file as a small company; certainly, the fact that it is affiliated with smaller companies is not a persuasive basis.[6] We therefore conclude that TUECA's requested waiver is not justified. If TUECA believes that consistency in the cost support data it files for its companies is sufficiently important, nothing in the Rules would prohibit TUECA from filing cost support data at the Tier 2A level of detail for all of its companies.

8. We also find that United has failed to justify its request for waiver of Section 36.125(f). As we stated in the *TRP Waiver Order*, we are not persuaded that waiver of Section 36.125(f) is appropriate. As a general matter, we are reluctant to waive the separations rules, which are adopted by the Federal-State Joint Board, unilaterally. Despite the stated support of the relevant state commission for United's position,[7] we are especially sensitive to granting waivers of the separations rules when this would result in a shift of revenue requirements to the intrastate jurisdiction. Admittedly, the ongoing transition to a DEM allocator of COE expenses will result in a shift of costs to

the states. Nevertheless, the sudden shift of costs to the intrastate revenue requirement that United projects is contingent on the company's growth to more than 50,000 access lines. It is not certain that this will occur as United projects. For these reasons, we will deny United's petition.

9. Finally, we grant Roseville's petition for waiver of Section 69.3(a) to permit Roseville to make textual modifications for the sake of clarity. We do not believe that Roseville needs a waiver of Section 69.3(a) to permit it to delete inapplicable tariff language from NECA's tariff in order to file its own tariff. We, of course, grant Roseville's requested waiver of the deadline imposed in the *TRP Order*.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that the petition for waiver filed by Telephone Utilities Exchange Carrier Association IS DENIED.

11. IT IS FURTHER ORDERED that the petition for reconsideration filed by United Telephone Company of the Northwest IS DENIED.

12. IT IS FURTHER ORDERED that the application for special permission filed by Roseville Telephone Company IS GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Commission Requirements for Cost Support Material To Be Filed by Tier 2 Companies with 1989 Annual Access Tariffs, DA 88-1873, released Dec. 2, 1988 (*Tier 2 TRP Order*).

[2] Annual 1989 Access Tariff Filings, DA 88-1872, released Dec. 2, 1988.

[3] *See* Letter from Chief, Tariff Division, Common Carrier Bureau, FCC, to B. Lambergman, Counsel for Roseville Telephone Company, Dec. 1, 1988.

[4] Section 69.3(a) limits annual access tariff filings to changes in rate levels.

[5] *See* Commission Requirements for Cost Support Material To Be Filed with 1989 Annual Access Tariffs, DA 88-1554, released Oct. 3, 1988 (*TRP Order*).

[6] *See* ALLTEL Corp. v. FCC, 838 F.2d 551 (D.C. Cir. 1988).

[7] *See* Letter from E. Morrison, Administrator, Telecommunications Division, Public Utility Commission of Oregon, to D. Searcy, Secretary, FCC, Dec. 12, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-552

In re Applications of

AMERICAN INDIAN BROADCAST GROUP, INC. (herafter AIBG)	File No. BPH-870921MB
SOUTHWEST TEXAS FM LIMITED PARTNERSHIP (hereafter STLP)	File No. BPH-870922MC

For Construction Permit for a
New FM Station on Channel 270C1
in San Angelo, Texas

HEARING DESIGNATION ORDER

Adopted: November 25, 1988; Released: January 11, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *STLP*. On December 22, 1987, STLP filed a petition to deny the AIBG application. STLP's petition to deny is essentially a petition to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcasting Applications; Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in these petitions have not been considered. Accordingly, an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to Section 1.229. Accordingly, STLP's petition to deny will be dismissed.

3. In its amendment filed December 22, 1987, STLP attempts to certify that no limited partner will be involved in the management or operation of the proposed station. Applicant's statement does not satisfy the certification requirement of Section II, Item 3(a) of FCC Form 301. Accordingly, applicant shall submit an amendment to the presiding Administrative Law Judge clarifying whether the limited partnership was in compliance with the certification requirement of 47 C.F.R. § 73.3555 Note 2(a) as of the date of the close of the period for filing minor amendments as of right.

4. *Late - filed Amendments*. AIBG petitioned for leave to amend its application on April 27, 1988 and July 11, 1988. The accompanying amendments were filed after December 28, 1987, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

5. *Air Hazard*. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by AIBG and STLP would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

1. To determine whether there is a reasonable possibility that the tower height and location proposed by AIBG and STLP would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That STLP shall file the amendment as specified in Paragraph 3 with the presiding Administrative Law Judge within 30 days of the release of this Order.

8. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by AIBG ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

10. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-565

In re Applications of

MEXICAN-AMERICAN COMMUNICATIONS ENTERTAINMENT GROUP (hereinafter Group) File No. BPH-880113MA

DIVCON ASSOCIATES, INC. (hereafter Divcon) File No. BPH-880114MR

DIVERSIFIED COMMUNICATIONS (hereafter Communications) File No. BPH-880114NI

For Construction Permit for a New FM Station on Channel 258A in Bryan, Texas

HEARING DESIGNATION ORDER

Adopted: November 25, 1988; Released: January 10, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Group*. Greg Rodriquez is an employee of KHRN(FM) in Hearne, Texas. Greg Rodriquez has indicated his intent to terminate his relationship with KHRN (FM) in the event of grant of the referenced application. Accordingly, in the event of grant of Group's application, Greg Rodriquez will be required to sever all connections with KHRN (FM) prior to the commencement of program test authority.

3. *Divcon*. Bob Davis Bell and Judith Swindall Bell are principals in KAGC(AM) in Bryan, Texas. Bob Davis Bell and Judith Swindall Bell have indicated their intent to terminate their relationship with KAGC (AM) in the event of grant of the referenced application. Accordingly, in the event of grant of Divcon's application, Bob Davis Bell and Judith Swindall Bell will be required to sever all connections with KAGC(AM) prior to the commencement of program test authority.

4. Divcon is the principal of KKNX(AM) in Huntsville, Texas. Divcon has indicated its intent to terminate its relationship with KKNX (AM) in the event of grant of the referenced application. Accordingly, in the event of grant of Divcon's application, Divcon will be required to sever all connections with KKNX(AM) prior to the commencement of program test authority.

5. *Group and Communications*. Group and Communications each indicated that they will locate their antenna at an existing tower which was used by KBTX-TV, Bryan, Texas. According to the Commission's data base, the accepted coordinates for this tower are N. Latitude 30' 38' 34" and W. Longitude 96' 19' 52" and the proper tower heights are 147 meters above ground level (AGL) and 233 meters above mean sea level (AMSL). However, Group listed in its section V-B and tower sketch that the height for the existing structure was 148 meters AGL. Communications listed the coordinates as N. Latitude 30' 38' 34" and W. Longitude 96'19' 51" and in its section V-B and tower sketch the tower height is specified as 232 meters AMSL. Because these applicants clearly propose to locate on an existing tower that was used by a Commission licensee and because specific reference is made to this tower in various places in the applications in question, the staff could, "drawing on the applications as a whole", confidently verify the transmitter location by taking official notice of the site coordinates and tower heights as found in the Commission's files for the facility. Accordingly, the Group and Communications applications are acceptable for filing, however, they shall be required to file corrective amendments to their applications with the presiding Administrative Law Judge within 30 days of this Order.

6. *Communications*. Joe Lee Walker and Pamela Jean Walker, principals in the applicant, have indicated their intent to terminate their 70% interest of Freckles Broadcasting, licensee of FM Station KHRN, Hearne, Texas in the event of grant of the referenced application. Accordingly, in the event of grant of Communication's application, Joe Lee Walker and Pamela Jean Walker will be required to sever all connections with KHRN(FM) prior to the commencement of program test authority.

7. Group and Divcon have petitioned for leave to amend their applications on March 25, 1988 and October 4, 1988, respectively. The accompanying amendments were filed after March 24, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

8. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That, in the event of grant of Group's application, Greg Rodriquez will be ordered to divest himself of all interests in and sever all connections with Station KHRN(FM) prior to the commencement of program test authority.

12. IT IS FURTHER ORDERED, That, in the event of grant of Divcon's application, Bob Davis Bell and Judith Swindall Bell will be ordered to divest themselves of all interests in and sever all connections with Station KAGC(AM) prior to the commencement of program test authority.

13. IT IS FURTHER ORDERED, That, in the event of grant of Divcon's application, Divcon will be ordered to divest itself of all interests in and sever all connections with Station KKNX(AM) prior to the commencement of program test authority.

14. IT IS FURTHER ORDERED, That Group and Communications shall submit the amendments, as specified in paragraph 5 above, to the presiding Administrative Law Judge within 30 days after the release of this Order.

15. IT IS FURTHER ORDERED, That, in the event of grant of Communication's application, Joe Lee Walker and Pamela Jean Walker will be ordered to divest themselves of all interests in and sever all connections with Station KHRN(FM) Hearne, Texas prior to the commencement of program test authority.

16. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Group and Divcon ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

17. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-556

In re Applications of

MT. WASHINGTON VALLEY BROADCASTING, LIMITED PARTNERS (hereafter MVB) File No. BPH-870909ME

JEFFREY M. MESSERMAN AND CATHY R. MESSERMAN *d/b/a* CARROLL COUNTY BROADCASTING (hereafter Carroll) File No. BPH-870909MI

For Construction Permit for a New FM Station on Channel 283A, in Conway, New Hampshire

HEARING DESIGNATION ORDER

Adopted: November 25, 1988; Released: January 10, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *MVB.* On November 9, 1987, Mr. Robert J. Connelly, the General Partner of the applicant, became Sales Manager of Stations WMMB and WMMY(FM), Melbourne, Florida. Mr. Connelly has indicated that he will sever all connections with Stations WMMB and WMMY-FM in the event a construction permit is awarded to the Conway application as a result of this proceeding. Accordingly, an appropriate condition will be ordered.

3. *Carroll.* Jeffrey M. Messerman and Cathy R. Messerman are currently employed by Infinity Broadcasting, licensee of WBCN(FM), Boston, Massachusetts. Mr. & Mrs. Messerman have indicated that, prior to the commencement of program test authority, they will terminate their employment and sever all connection with Infinity Broadcasting in the event a construction permit is awarded to their Conway application as a result of this proceeding. Accordingly, an appropppriate condition will be ordered.

4. MVB petitioned for leave to amend its application on November 25, 1987. The accompanying amendment was filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That, in the event of grant of the MVB application, Mr. Robert J. Connelly shall divest himself of all interest in and sever all connections with Stations WMMB and WMMY(FM), Melbourne, Florida, prior to the commencement of program test authority.

9. IT IS FURTHER ORDERED, That, in the event of grant of the Carroll application, Jeffrey M. Messerman and Cathy R. Messerman shall divest themselves of all interest in and sever all connections with Infinity Broadcasting prior to the commencement of program test authority.

10. IT IS FURTHER ORDERED, That the petition for leave to amend filed by MVB IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the

hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-555

In re Applications of

STEVEN W. STAPLES, JR. (hereafter Staples)	File No. BPH-880107MR
RICKY ALLEN BURKE (hereafter Burke)	File No. BPH-880112MD
MONTICELLO-WAYNE COUNTY MEDIA, INC. (hereafter Media)	File No. BPH-880112ME

Construction Permit for a
New FM Station on Channel 226A
in Monticello, Kentucky

HEARING DESIGNATION ORDER

Adopted: November 25, 1988; Released: January 10, 1989

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Staples*. Stephen W. Staples, Jr., program Director of WKYM-FM in Monticello, Kentucky, has indicated his intent to terminate his relationship with WKYM-FM in the event of grant of the referenced application. Accordingly, in the event of grant of Staple's application, Staples will be required to sever all connections with WKYM-FM prior to the commencement of program test authority.

3. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

5. IT IS FURTHER ORDERED, That, in the event of grant of Staple's application, Staple will be ordered to divest himself of all interests in and sever all connections with Station WKYM-FM, Monticello, Kentucky, prior to the commencement of program test authority.

6. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

7. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements for
Cost Support Material To Be
Filed By Tier 2 Companies
with 1989 Annual Access Tariffs

ROSEVILLE TELEPHONE COMPANY

Petition for Waiver

ORDER

Adopted: December 28, 1988; Released: January 10, 1989

By the Chief, Common Carrier Bureau:

1. On December 9, 1988, the Roseville Telephone Company (Roseville) filed a petition for waiver of certain requirements set forth in the Common Carrier Bureau's (Bureau) December 2, 1988, Order in the above-captioned proceeding.[1] The requirements pertain to the filing, by carriers, of information regarding their past Tariff Review Plans (TRPs).

2. In the *December 2 Order*, this Bureau ruled that any Tier 2 carrier who could not furnish the required data could file a petition for waiver by December 9, 1988.[2] Roseville, a Tier 2A carrier, maintains that it will be unable to provide certain data in connection with TRP Charts T2DMD-4 and T2ACOS-2. According to Roseville, 1989 will be the first year in which it files its own access tariff. Rows 120 and 140 of TRP Chart T2DMD-4 request data from 1987 and 1988 TRP Charts. Similarly, Rows 400-500 and Rows 700-800 of TRP Chart T2ACDOS-2 request data from previous years as well. Roseville asserts that it does not have TRP Charts for previous years because it was a participant in the National Exchange Carrier Association Carrier Common Line and Traffic Sensitive pools for those years.

3. The Common Carrier Bureau has reviewed Roseville's request and we have concluded that the public interest will be served by granting it a waiver of the *December 2 Order* requirement in question. No party has commented on or opposed Roseville's petition. Furthermore, this Bureau has already granted a similar waiver to Nevada Bell. [3] Accordingly, we find that Roseville's petition for waiver should be granted.

4. IT IS THEREFORE ORDERED that the petition for waiver of requirements set forth in the Common Carrier Bureau's *December 2 Order* in the above-captioned proceeding IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Commission Requirements for Cost Support Material To Be Filed By Tier 2 Companies with 1989 Annual Access Tariffs, DA 88-1873, released Dec. 2, 1988 (*December 2 Order*).

[2] *Id.* at para. 12.

[3] *See* Annual 1989 Access Tariff Filings, Petitions for Waiver and Petition for Reconsideration, DA 88-1872, released Dec. 2, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-1
Phase I

In the Matter of

Annual 1988 Access Tariff Filings

MEMORANDUM OPINION AND ORDER

Adopted: December 28, 1988; Released: January 10, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On December 24, 1987, the Common Carrier Bureau released an Order initiating this investigation of the annual 1988 access tariff filings of several local exchange carriers (LECs).[1] The *December 24 Order* also suspended the special access rate increases proposed by eight LECs for two months.[2] On January 14, 1988, the Bureau issued an Order in Phase I of this proceeding designating information to be submitted by the LECs and establishing an expedited pleading cycle. [3] That *Designation Order* required LECs to submit information to explain the apparent inconsistencies between the methodologies LECs used to develop special access revenue requirements and the methodologies those LECs used to develop demand quantities.

2. Several companies filed direct cases defending their methodologies,[4] while others filed reductions in their proposed rates.[5] Subsequently, the Bureau terminated the suspension of the rates proposed by SNET and NY Tel.[6] On February 29, 1988, the Bureau released an Order in this investigation that extended the suspension of the GTOC rate increases,[7] but found that the cost-demand relationships used to develop the special access revenue requirements of the remaining carriers[8] were sufficiently consistent so as not to warrant any further suspension while this investigation proceeded.[9]

3. The Ad Hoc Telecommunications Users Committee (Ad Hoc) filed a petition for reconsideration of the *February 29 Order*. Mountain States, NW Bell, and Pacific Northwest Bell Telephone Company (together US West), NY Tel and New England (together NYNEX), Ameritech, and Bell Atlantic filed oppositions and Ad Hoc replied.

4. On May 27, 1988, the Bureau issued an Order Designating Issues for Investigation in Phase II of this docket.[10] In that Order, the Bureau required further responses to allegations that the LECs had failed to reflect projected declines in special access lines in their projected cost computations.

II. PLEADINGS

5. Ad Hoc asks us to rescind our finding that the carriers whose rates had been suspended had achieved consistency between special access demand forecasts and cost projections comparable to consistency exhibited by the carriers whose tariffs were not suspended. Ad Hoc Petition at 1-2. Ad Hoc says that unlike the other carriers, Bell Atlantic, Ameritech, and New England claim rising costs while also claiming decreases in demand. *Id.* at 10. Ad Hoc further states that the explanations given by these carriers are trivial. *Id.* at 13. Ad Hoc thus asks that this issue be reopened and designated for further investigation, and that an accounting order be imposed. *Id.* at 1-2.

6. US West contends that the Commission need not take any further action regarding US West's tariffs because Ad Hoc's objections only concerned Ameritech, Bell Atlantic, and New England. US West Opposition at 4. NYNEX argues that reconsideration is inappropriate because the *February 29 Order* was interlocutory. NYNEX Opposition at 5-7. Moreover, NYNEX argues that the request for further investigation is moot because these issues are indeed receiving further investigation in Phase II of this proceeding. *Id.* at 7. NYNEX and Bell Atlantic allege that an accounting order cannot be imposed in this case because an accounting order must follow a suspension. *Id.* at 7-8; Bell Atlantic Opposition at 2 n.6. NYNEX further asserts that one of the carriers whose tariff revisions were not suspended, the BellSouth Telephone Companies (BellSouth), filed increased rates even though its demand was lower. Therefore, NYNEX argues, its rates do demonstrate as much consistency as those BellSouth rates that were not suspended. NYNEX Opposition at 10.

7. Moreover, the LECs state that it is overly simplistic to argue that costs are directly related to demand, especially that special access costs generally are directly related to the demand for just one subelement of special access, channel terminations. *Id.* at 11-12, 14; Bell Atlantic Opposition at 3; Ameritech Opposition at 4-7. Bell Atlantic and NYNEX maintain that, in any case, this phase of the investigation was not meant to resolve all issues related to demand and cost relationships; rather, it was merely intended to investigate whether separations factors had been properly adjusted to reflect decreased demand. Bell Atlantic Opposition at 2-3; NYNEX Opposition at 13-14.

8. In its reply, Ad Hoc argues that under Section 204 of the Communications Act, a suspension is not required for an accounting order. Ad Hoc Reply at 3. Furthermore, Ad Hoc contends that the *February 29 Order* was not interlocutory because it was a final action with respect to the issue of the discrepancy between costs and demand. *Id.* at 4. Ad Hoc disputes the claim that this phase of the investigation was limited to separations factors; it states that the *Designation Order* specifically asked for an explanation of the consistency between revenue requirements and demand. *Id.* at 4-5.

III. DISCUSSION

9. The relief that Ad Hoc seeks has been made moot by the Commission's action in Phase II of this proceeding. Ad Hoc asks that we find that certain carriers have not attained the same level of consistency in their demand and cost projections as other carriers. Ad Hoc also asks us to designate as a further issue for investigation the ques-

tion of consistency between demand projections and cost projections. Finally, Ad Hoc asks us to impose an accounting order on the rates of certain carriers.

10. The *February 29 Order* did not make any final determination with respect to the consistency question. In Phase II of this proceeding, the Bureau designated for investigation the issue of whether the LECs had failed to reflect demand changes in their cost computations. Thus, there is no need to designate this question for further investigation at this time. Pursuant to the *Phase II Designation Order*, we received data on this issue from all the regional Bell Operating Companies, GTOC, the Centel Telephone Companies, Cincinnati Bell, the Contel Telephone Companies, SNET, the Rochester Telephone Corporation, and the United Telephone System. This data will be examined *de novo* in Phase II. Therefore, it is now irrelevant whether all these carriers had theretofore achieved the same level of consistency.

11. If Ad Hoc is seeking reconsideration of the decision to refrain from extending the suspension, the request for reconsideration is untimely because a tariff cannot be suspended after it becomes effective. The Commission has already determined that such a no suspension decision is not subject to reconsideration.[11]

12. Ad Hoc has not presented any persuasive reason for changing our decision to refrain from imposing an accounting order upon the LECs who had been subject to the suspension. Ad Hoc has not demonstrated that its interests will be prejudiced because we did not impose an accounting order. The Commission has previously observed:[12]

> [T]he obligation of a carrier to its customers does not depend on whether we suspend a tariff or require the carrier to keep accounts of how its rate changes affect particular customers, but on whether the rates themselves are just, reasonable and not unduly discriminatory within the meaning of the Act.

13. Accordingly, we deny the request to reconsider our decision to refrain from imposing an accounting order.

IV. ORDERING CLAUSE

14. IT IS THEREFORE ORDERED that the petition for reconsideration filed by the Ad Hoc Telecommunication Committee in the above-captioned proceeding IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Annual 1988 Access Tariff Filings, 3 FCC Rcd 1281 (1987) (*December 24 Order*).

[2] Specifically, the Bureau suspended until March 1, 1988, the special access rates filed by the Ameritech Operating Companies (Ameritech) (except Indiana Bell Telephone Company), the Bell Atlantic Telephone Companies (Bell Atlantic), New England Telephone and Telegraph Company (New England), New York Telephone Company (NY Tel), Mountain States Telephone and Telegraph Company (Mountain States), Northwestern Bell Telephone Company (NW Bell), the GTE Telephone Operating Companies (GTOC) (California, Florida, Texas, and Washington), Cincinnati Bell Telephone Company (Cincinnati Bell), and Southern New England Telephone Company (SNET).

[3] Annual 1988 Access Tariff Filings, 3 FCC Rcd 507 (1988) (*Designation Order*).

[4] GTOC, NY Tel, and SNET.

[5] Bell Atlantic, Cincinnati Bell, Ameritech, New England, Mountain States, and NW Bell.

[6] Annual 1988 Access Tariff Filings, 3 FCC Rcd 926 (1988).

[7] The continuing suspension for GTOC was lifted by a subsequent Bureau Order. Annual 1988 Access Tariff Filings, GTE Telephone Operating Companies, CC Docket No. 88-1, Phase I, Part 2, DA 88-530, released Apr. 14, 1988.

[8] These included the tariff revisions filed by Bell Atlantic, Cincinnati Bell, Ameritech, New England, Mountain States, and NW Bell.

[9] Annual 1988 Access Tariff Filings, 3 FCC Rcd 2043 (1988) (*February 29 Order*).

[10] Annual 1988 Access Tariff Filings, 3 FCC Rcd 3103 (1988) (*Phase II Designation Order*), Erratum, 3 FCC Rcd 3761 (1988). This Order designated nine issues for investigation: inside wire costs, Central Office Equipment (COE) Category 3 costs, COE Category 4.23 costs, Cable and Wire Facilities costs, voice grade special access demand, tax issues, New England separations data, the entire annual access tariff filing of GTE of Florida, and Illinois Bell Telephone Company television and radio services rates.

[11] AT&T Communications, CC Docket No. 85-326, 1 FCC Rcd 930 (1986).

[12] American Television Relay, 70 FCC 2d 1623, 1628 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-579
Phase II

In the Matter of

Access Billing Requirements
for Joint Service Provision

NATIONAL EXCHANGE CARRIER
ASSOCIATION

Petition for Waiver

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 1988; Released: December 28, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On November 1, 1988, the National Exchange Carrier Association (NECA) filed a petition for waiver of requirements set forth by the Common Carrier Bureau (Bureau) in an Order released October 4, 1988.[1] Specifically, NECA requests the Bureau (1) to eliminate the requirement to justify the multiple bill option (MBO) for traffic sensitive (TS) pool participants who are interconnected with local exchange carriers (LECs) that have received Bureau approval of multiple bill use; (2) to defer the submission of justification of MBO use by the other TS pool participants; and (3) to defer the requirements to provide Carrier Access Billing System (CABS) Output Specifications bills for all TS pool participants pending resolution of which LECs will ultimately use the multiple bill option.[2]

2. Supporting comments were filed by the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO) on November 8, 1988, the United States Telephone Association (USTA) on November 9, 1988, and the National Telephone Cooperative Association (NTCA) on November 14, 1988. No comments opposing the NECA petition have been filed.

II. BACKGROUND

3. The Commission and this Bureau have considered meet point billing questions, which arise when access services are provided by two or more exchange carriers, on various occasions since 1983, when the first access tariff filings contained two optional provisions covering the billing of access services provided by more than one carrier. The first option, single company billing, essentially required interexchange carriers (ICs) to order service from the LEC in whose territory the end user serving office associated with the IC's point of presence (POP) was located. That LEC would then determine the charges, arrange to provide the service, perform the billing from its own tariff for the complete service provided, and settle accounts with the other LECs involved in providing that service. The other option, meet point billing, required the LECs involved to divide ordering, rating, and billing services on a proportional basis, so that each carrier would bill under its own tariff. [3]

4. In 1984, the Commission required carriers to delete the first option from their tariffs, because it effectively allowed a carrier providing service to charge rates based on the tariff of a carrier not providing the service.[4] The cumulative effect of three subsequent Bureau Orders was to delay implementation of this requirement until January 1, 1988.[5] These Orders concluded that the technical and administrative difficulties of implementing meet point billing outweighed any harm that might be caused by use of single company billing for a limited period.

5. In addition, the *March 28 Order* (the last of the three Orders) adopted an industry proposal that an *ad hoc* group be established to study alternative access billing arrangements and to submit a report of the group's investigation and findings to the Commission. In December 1986, the Meet Point Billing Task Force of the Exchange Carrier Standards Association, Inc. (ECSA) filed a report (ESCA Report) adopted by ECSA's Ordering and Billing Forum (OBF). The ECSA Report contained proposals for implementing meet point billing.

6. Specifically, the ESCA Report elaborated on two options -- the single bill option and the multiple bill option. The ECSA Report noted that the single bill option could take one of three forms -- single bill/multiple tariff, single bill/pass-through tariff, or single bill/single tariff. The ECSA Report concluded that all the LECs involved in providing access service for a particular meet point should agree on one alternative in order to implement the single bill option. In its *July 1987 Order*,[6] the Commission accepted ECSA's determination that this option, in one of its three forms, was preferable to the multiple bill option because the former enhances billing accuracy and customer verification.[7] The Commission stated, however, that it would allow continuation of the multiple bill option as a default option, in recognition of the circumstances of small LECs and LECs that had already implemented multiple bill meet point billing. The multiple bill option would also be available as a last resort if the LECs involved could not reach an agreement, but the Commission emphasized that it should be used as a default option only.[8]

7. In our *October 4 Order*,[9] this Bureau directed those LECs who had not yet justified their use of the MBO, and were unable to implement or to complete the implementation of the single bill option, to justify their use of the multiple bill option in a December 1, 1988, filing.[10] Furthermore, that Order directed each LEC that participates in multiple billing to attach to its December 1 filing a bill sample demonstrating compliance with the Multiple Exchange Carrier Access Billing Guidelines recommended in the ECSA Report.[11]

III. DISCUSSION

8. NECA seeks a waiver of three requirements of the *October 4 Order*. First, NECA requests a waiver of the requirement to provide justification of multiple billing use for those TS pool participants who connect with larger LECs that have been allowed to use the multiple

billing option.[12] NECA asserts that small LECs who connect with large LECs cannot implement single billing on their own, if their connecting LEC uses multiple billing.

9. We believe that for purposes of administrative efficiency, it would be appropriate to grant NECA's request. We agree with NECA's assertion that a small LEC connecting with a large LEC would be unable to implement single billing if the large LEC uses multiple billing. Furthermore, if we accept a large LEC's justification for using multiple billing, then we will accept the same justification from a connecting small LEC. Therefore, it would be a waste of carrier and Commission resources to require a small LEC to justify its use of multiple billing if we already permit such use by its larger connecting LEC.

10. Second, NECA seeks a waiver of the requirement to provide multiple billing use justification for its other TS pool participants – those carriers that connect with large LECs not yet authorized to use multiple billing. Rather than seeking a complete waiver, however, it wishes to have the requirement postponed pending the Bureau's review and ruling on the December 1, 1988, LEC filings.[13] NECA argues that the majority of its TS pool participants are willing to convert from the multiple to the single billing option if, or when, the large LECs to which they are connected do the same. Since the TS pool participants' decision to convert depends on whether the large LECs' December 1 justifications are accepted by the Bureau,[14] NECA believes it would be administratively efficient to defer requiring smaller carriers to provide their own multiple bill justification until the Bureau acts on those large LEC filings.[15]

11. Third, NECA seeks a waiver of the requirement that it file copies of CABS bills on December 1, 1988, for those TS pool participants using the multiple billing option. It says the TS pool participants may not have to file CABS bills if their connecting LECs are allowed to use multiple billing based on the December 1, 1988, filings. USTA contends that the requirement that LECs submit CABS bills is "neither authorized nor contemplated by the Communications Act."[16]

12. We believe that NECA has persuasively pleaded its case for waiver of the two requirements discussed in paragraphs 10 and 11, *supra*. Since the majority of its TS pool participants intend to employ the billing option adopted by the large LECs to which they connect, it would be administratively efficient for NECA carriers to wait until the Bureau reviews the December 1, 1988, justifications filed by large LECs. If we accept the use of multiple billing by those large LECs, then the connecting LECs will have wasted considerable resources in providing justifications that are not needed. This same rationale applies to the filing of CABS bills. Hence, we grant NECA's request for a delay of the last two requirements discussed above until such time as this Bureau accepts or rejects the December 1 justifications of the larger carriers.

13. USTA and OPASTCO urge us to grant NECA's petition. They also ask that the Bureau extend NECA's waiver request of the three meet point requirements to small LECs who connect with large LECs, but are not NECA TS pool participants.[17] We decline to extend our waiver in the manner sought by USTA and OPASTCO. The December 1, 1988, deadline has already passed and no other carriers have formally sought the waivers requested by NECA. In addition, USTA and OPASTCO have not substantiated the need of the other LECs for a waiver, nor do they provide any indication of who those LECs might be. Therefore, we limit the waiver of these meet point requirements to carrier participants in the NECA TS pool.

IV. CONCLUSION; ORDERING CLAUSE

14. The Common Carrier Bureau has reviewed NECA's request and we conclude that the public interest will be served by granting NECA a waiver of the above-mentioned requirements set forth in the *October 4 Order*. We will address when, or if, the TS pool participants must file their justifications for multiple bill use and their CABS bills after we rule on the December 1, 1988, filings made by large carriers with which they connect.

15. IT IS THEREFORE ORDERED that the petition for waiver filed by the National Exchange Carrier Association in the captioned proceeding IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Access Billing Requirements for Joint Service Provision, CC Docket No. 87-579, Phase II, DA 88-1544, released Oct. 4, 1988 (*October 4 Order*).

[2] NECA Petition at 2.

[3] *See* Access Billing Requirements for Joint Service Provision, CC Docket No. 87-579, Order Designating Issues for Investigation, 3 FCC Rcd 3568 (1988) (*Designation Order*).

[4] *See* Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, 97 FCC 2d 1082, 1176-77 (1984).

[5] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Mimeo No. 2964, released Mar. 16, 1984 (requirement waived until June 1985); Petitions for Waiver Concerning 1985 Annual Access Tariff Filings, Mimeo No. 5007, released June 7, 1985 (waiver extended until April 1, 1986); Waiver of Access Billing Requirements and Investigation of Permanent Modifications, CC Docket No. 86-104, Mimeo No. 3402, released Mar. 28, 1986 (*March 28 Order*) (waiver extended until January 1, 1988).

[6] *See* Waiver of Access Billing Requirements and Investigation of Permanent Modifications, CC Docket No. 86-104, 2 FCC Rcd 4518 (1987) (*July 1987 Order*).

[7] *Id.* at 4519.

[8] *Id.*

[9] *See* note 1, *supra*. The *October 4 Order* resulted from an investigation initiated by the Bureau in the *Designation Order*.

[10] *October 4 Order* at para. 95.

[11] *Id.* at para. 96.

[12] NECA Petition at 7.

[13] *Id.*

[14] Several carriers, such as US West, were deemed in the *October 4 Order* to have inadequately explained their use of multiple billing. Therefore, we ordered them to provide further arguments for justifying such use by December 1, 1988.

[15] *Id.* at 7-8.

[16] USTA Comments at 3.

[17] *See id.* at 2; *see also* OPASTCO Comments at 3.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

WODLINGER BROADCASTING OF MIAMI, INC., Assignor and Beasley-Reed Broadcasting of Miami, Inc., Assignee

File No. BAPH-850911GP

For Voluntary Assignment of Construction Permit of Station WPOW(FM), Miami, Florida (formerly WCJX(FM), Miramar, Florida)

ORDER

Adopted: December 19, 1988; Released: January 11, 1989

By the Commission:

1. On September 9, 1986,[1] the Chief, Audio Services Division, Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, denied a petition for reconsideration filed April 4, 1986, by Harold Martin (Martin). The petition sought reversal of the Audio Services Division's March 17, 1986 action denying Martin's November 25, 1985 petition to deny the subject assignment application, and granting the subject assignor, Wodlinger Broadcasting of Miami, Inc., authority to assign the construction permit of FM station WCJX (now WPOW), Miami, Florida, to Beasley-Reed Broadcasting of Miami, Inc. The Commission has before it now an application for review filed by Martin.

2. The application for review restates arguments made in Martin's petition for reconsideration. We have carefully reviewed the Bureau's disposition of the petition for reconsideration and find no reason to disturb that ruling. In light of petitioner's incorrect interpretation of § 73.3579, no *prima facie* case of violation of that rule or related misrepresentation was made. Accordingly, IT IS ORDERED, That pursuant to Section 1.115(g) of the Commission's Rules, the application for review IS DENIED.

3. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, shall send by Certified Mail-Return Receipt Requested, a copy of this Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] The letter was originally dated and mailed on August 29, 1986. However, two of the three addresses to which it was sent were subsequently found to be incorrect. The addresses were corrected and the letter mailed again on September 9, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-490

In the Matter of

Amendment of Section 73.202(b) RM-6400
Table of Allotments
FM Broadcast Stations
(Parker, Arizona)

ORDER DENYING REQUEST FOR CONSOLIDATION OF REPLY COMMENT DEADLINE

Adopted: December 23, 1988; Released: December 27, 1988

By the Chief, Policy and Rules Division:

1. Before the Commission is a request for consolidation of the reply comment deadlines in this case, filed by The Scofield Broadcasting Company, Inc. (SBC), on December 20, 1988. The *Notice of Proposed Rule Making* in this proceeding, 3 FCC Rcd 6130 (1988), established a comment deadline of December 12, 1988, and a reply comment deadline of December 27, 1988. SBC filed a timely counterproposal to the substitution, proposed in the notice, of Channel 257C2 for Channel 257A at Parker, Arizona.

2. SBC notes that it is customary, when a counterproposal is filed and accepted, for the Commission to issue a public notice of the filing of the counterproposal and set a deadline for the filing of additional pleadings responsive to the counterproposal. SBC submits that it expects acceptance of its counterproposal, and that the "reply comment" deadline set by the public notice of that action should be consolidated with the reply comment deadline set by the NPRM,[1] thereby extending the reply comment deadline set by the NPRM until such time as its counterproposal is accepted and a "reply comment" deadline set. SBC argues that consolidating the two dates would simplify the filing process, avoid duplicative pleadings and confusion as to the substance of the reply pleadings, and avoid confusion as to whether the counterproposal has been accepted. SBC argues that its request should not be viewed as an extension of time request.

3. We disagree. We see no distinction between a request to extend the reply comment date set by the NPRM and a request to consolidate the NPRM reply comment date with the public notice reply date, except that the request for consolidation does not request an extension to a date certain.

4. It is the policy of the Commission that extensions of time shall not be routinely granted. 47 CFR § 1.46(b). We do not believe the avoidance of confusion that SBC cites in support of its request provides sufficient justification for an extension of time. Indeed, ad hoc departures from the present pleading cycle procedures present greater potential for confusion. Moreover, extension of the NPRM reply comment date to a date contingent on the acceptance of a counterproposal, an event which may not occur, could result in an "open" pleading cycle in any case in which an unacceptable counterproposal is filed. Therefore, we do not believe grants of the type of request filed by SBC would be conducive to the efficient transaction of Commission business.

5. Accordingly, IT IS ORDERED, That the Request to Consolidate Reply Comment Deadline filed by The Scofield Broadcasting Company, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The reply comment deadline established by the NPRM is established for a different purpose than the "reply" date established by a public notice of the filing of a counterproposal. The reply comment date set by the NPRM sets a deadline for the filing of responsive pleadings to any comments and objections filed in response to the NPRM. The setting of an additional deadline for the filing of pleadings responsive to the counterproposal allows the Commission time to determine if the counterproposal is acceptable, and avoids the need for pleadings addressing the counterproposal if the counterproposal is unacceptable. It also provides additional time for the completion of technical studies the parties may wish to undertake as a result of the filing of an acceptable counterproposal.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 12, 1989

PLEADING ESTABLISHED FOR COMMENTS ON BELL ATLANTIC'S CEI PLAN FOR PROTOCOL CONVERSION SERVICES

On December 21, 1988, the Bell Atlantic Telephone Companies (Bell Atlantic) filed a comparably efficient interconnection (CEI) plan to provide a variety of protocol conversion services within its network. Bell Atlantic proposes to offer several types of protocol conversions in connection with three different categories of basic services: (1) Public Data Network Service; (2) Central Office Local Area Network Service; and (3) Private Line Service. According to Bell Atlantic, there is customer demand for expansion of its protocol conversion serices. Presently, Bell Atlantic has authority to provide asynchronous to X.25 and X.75 protocol conversions. Bell Atlantic notes that in the future, it may expand its offering of new synchronous protocols as new equipment becomes available.

As required in the Computer III proceeding (*Phase I Order*, 104 FCC 2d 958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *further reconsideration*, 3 FCC Rcd 1135 (1988)), the Commission must approve the CEI plan before Bell Atlantic can begin implementing the proposed service.

According to Bell Atlantic, it will account for the joint and common costs of the protocol conversion services pursuant to its Part 32 cost allocation manual that the Commission has conditionally approved (Bell Atlantic Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 109 (1988)). Bell Atlantic also describes its plans for complying with the other Computer III nonstructural safeguards governing the use of customer proprietary network information, nondiscrimination reporting and nondiscriminatory provisioning, and disclosure of network information.

Interested parties should file comments on Bell Atlantic's plan by **January 30, 1989,** and reply comments by **February 13, 1989,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of Bell Atlantic's plan can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v.

HAWAIIAN TELEPHONE COMPANY,	File Nos. E-87-106
GENERAL TELEPHONE COMPANY of Illinois,	E-87-107
GENERAL TELEPHONE COMPANY of Indiana,	E-87-108
GENERAL TELEPHONE COMPANY of Michigan,	E-87-109
GENERAL TELEPHONE COMPANY of Ohio,	E-87-110
GENERAL TELEPHONE COMPANY of the Midwest,	E-87-111
GENERAL TELEPHONE COMPANY of the South,	E-87-112
GENERAL TELEPHONE COMPANY of Kentucky,	E-87-113
GENERAL TELEPHONE COMPANY of the Southeast,	E-87-114
GENERAL TELEPHONE COMPANY of Wisconsin, Defendants.	E-87-115

ORDER

Adopted: December 7, 1988; Released January 12, 1989

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On June 30, 1987, AT&T Communications (AT&T) filed formal complaints against, *inter alia*, the above-referenced affiliated telephone operating companies of GTE Service Corporation (GTE). The complaints alleged certain statutory and tariff violations associated with defendant's billing and collection rates for the period July 1, 1985 through December 31, 1986.

2. The parties have conducted discussions, including consultations with members of the Enforcement Division, aimed at settling the complaints. Consequently, a mutually agreeable settlement of all pending controversies between the parties was reached. On November 23, 1988, counsel for AT&T and the GTE operating companies filed a joint motion seeking dismissal of the complaints with prejudice and authorization of their settlement agreement. We are satisfied that dismissal of these complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the proposed settlement agreement of the parties IS AUTHORIZED.

4. IT IS FURTHER ORDERED that the joint motion to dismiss the above-referenced complaints with prejudice IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ATC HOLDINGS, INC.,

KBLCOM, INC.,
Complainants,

v. File No. PA-87-0003

FLORIDA POWER CORPORATION,
Respondent.

ERRATUM

Released: January 12, 1989

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. By an Order released October 5, 1988, DA 88-1517, the Chief, Enforcement Division dismissed the above-referenced pole attachment complaint. However, the respondent was incorrectly identified as The Bell Telephone Company of Pennsylvania. Therefore, the caption is corrected, as shown above, to identify the respondent as Florida Power Corporation.

2. The first sentence of the first paragraph is also corrected to read:

> On February 4, 1987, ATC Holdings, Inc. and KBLCOM, Inc. filed the above-referenced complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224, seeking a determination that Florida Power Corporation had imposed unjust and unreasonable rates for cable television pole attachments.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v. File No. E-88-32

MATANUSKA TELEPHONE
ASSOCIATION, INC.,
Defendant.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

ORDER

Adopted: December 9, 1988; Released: January 12, 1989

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. AT&T Communications (AT&T) has filed a motion to join Alascom, Inc. (Alascom) as an additional party plaintiff in the above captioned formal complaint proceeding against Matanuska Telephone Association, Inc. (Matanuska). AT&T indicates that the motion was occasioned by Matanuska's position, expressed in its answer, motion to dismiss and supporting brief, that the billing and collection services at issue in the instant case are provided to Alascom rather than AT&T. Matanuska contended that AT&T's failure to join Alascom as a plaintiff jeopardizes Alascom's interests and justifies dismissal of the complaint. Although AT&T contends that it is the ultimate customer and the real party in interest with respect to Matanuska's billing and collection services, it seeks to cure any alleged defects and satisfy Matanuska's concerns by joining Alascom as a plaintiff.

2. Matanuska responded to AT&T's motion and, while refusing to concede any of the arguments advanced by AT&T, stated that it would pose no objection to joinder of Alascom as a third party plaintiff. Both AT&T's motion and Matanuska's response were served on counsel for Alascom. Alascom has not, subsequently, interposed an objection to its joinder as a plaintiff. In fact, AT&T represents in its motion that Alascom has agreed to such joinder.

3. Permitting AT&T to join Alascom as a third party plaintiff in this case should expedite and expand discussions between Commission staff and the complainant and defendant aimed at settling the dispute. Joinder will also avoid the burden of an additional duplicative complaint. Since neither the defendant nor the party whose joinder is sought oppose AT&T's motion, it is appropriate to join Alascom as a third party plaintiff in the above-captioned proceeding.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Alascom shall be joined as third party plaintiff in E-88-32, AT&T Communications and Alascom, Inc. v. Matanuska Telephone Association, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLENTERTAINMENT,
INC.,
Complainant,

v. File No. PA-86-0006

MONONGAHELA POWER
COMPANY,
Respondent.

ORDER

Adopted: December 9, 1988; Released: January 12, 1989

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On March 6, 1986, Cablentertainment, Inc. filed the above-referenced complaint pursuant to Section 224 of the Communications Act, 47 U.S.C. § 224, seeking a determination that the respondent, Monongahela Power Company, had imposed unjust and unreasonable rates for cable television pole attachments. This matter was deferred pending issuance of amended rules for pole attachment rate complaints, *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, 2 FCC Rcd 4389 (1987).*

2. On July 26, 1988, counsel for Cable System USA Associates, Successor in interest to the complainant in this action, requested that the complaint be dismissed with prejudice.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the complaint filed by Cablentertainment, Inc. is DISMISSED and the proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-89-017

Application for authority to lease and operate satellite circuits for service to Europe, the Middle East and North Africa.

ORDER AND AUTHORIZATION

Adopted: December 23, 1988; Released: January 12, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on October 27, 1988 by American Telphone and Telegraph Company (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, for the continuation of authority expiring on December 31, 1988 to acquire and operate satellite circuits for service to points in Europe, the Middle East and North Africa which are not members of CEPT (the conference of 26 European Post/Telecommunications Administrations) until December 31, 1989.[1] AT&T states that traffic demands are such that no additional circuits will be necessary in 1989. The application was placed on public notice on November 2, 1988. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-89-017 IS GRANTED, and AT&T's authority to acquire and operate 2.084 voice-grade satellite circuits for service to Europe, the Middle East and North Africa (non-CEPT points) as listed in the Appendix is extended until December 31, 1989.

3. All other terms and conditions of the Commission's Order and Authorization released December 7, 1982, File No. I-P-C-82-045, remain the same.

4. The Commission's order cited in paragraph 1 above, IS HEREBY SUPERSEDED.

5. AT&T shall file an application for satellite circuits beyond 1989 for service to Europe, the Middle East and North Africa on or before November 1, 1989.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] The Commission's Order and Authorization released December 7, 1982 (File No. I-P-C-82-045) granted AT&T authority to lease and operate satellite circuits to non-CEPT countries for 1983, 1984 and 1985. This blanket authority was extended to year-end 1986 by an order released on December 31, 1985 in File No. I-T-C-86-018, and extended to year-end 1987 by an order released on December 31, 1986 in File No. I-T-C-87-010. *See* 1 FCC Rcd 1368 (1986). The Commission's Order and Authorization, DA 87-1881, released January 7, 1988 (File No. I-T-C-88-023) further extended AT&T's authority until December 31, 1988. *See* 3 FCC Rcd 36 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCCAW COMMUNICATIONS COMPANIES, INC. File No. ENF-88-16

Application for authority to close Maritime Mobile Public Coast (Class III-B) Station KTD 563 in Venice, Florida

ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: December 29, 1988; Released: January 12, 1989

By the Chief, Common Carrier Bureau:

1. On May 23, 1988, McCaw Communications Companies, Inc. (McCaw), filed an application requesting authority, pursuant to Section 214 of the Communications Act of 1934 (the Act), as amended, 47 U.S.C. § 214, to discontinue service from Maritime Mobile Public Coast (Class III-B) Station KTD 563, Venice, Florida on behalf of McCaw's subsidiary, MCI Airsignal, the licensee.[1] The application was placed on public notice on June 1, 1988. No comments were received.

2. McCaw's application requests that Section 214 authorization be granted *nunc pro tunc* effective July 3, 1986.[2] On that date, according to McCaw, McCaw received control of Station KTD 563 pursuant to its purchase of MCI Airsignal from MCI, Inc. (MCI). McCaw avers that, pursuant to said transfer, MCI warranted that Station KTD 563 was operational at the time of transfer. In fact, according to McCaw, operation of Station KTD 563 was discontinued prior to McCaw's acquisition without Commission authorization. Specifically, McCaw avers that the station's users were transferred to other stations and transmission ended "sometime in late 1984" and dispatching equipment was removed "in mid-1985 . . . ."[3]

3. In support of its *nunc pro tunc* request, McCaw states that no complaints regarding the discontinuance have been received during the past several years, and that Maritime Mobile Public Coast Service is available from several alternative area licensees, including Stations KWB 447 Tampa Bay,[4] KUZ 385 Clearwater, KYH 550 Ft. Myers and KTA 420 St. Petersburg, all in Florida.[5] Additionally, McCaw states that four U.S. Coast Guard stations provide emergency communications services in the area. Finally, McCaw argues that the facts it presents do not warrant a Notice of Apparent Liability since the unauthorized discontinuance "took place before McCaw's involvement and is now, upon discovery, being brought to the Commission's attention."[6] However, McCaw concedes that, pursuant to the July 3, 1986 transfer of control, McCaw acquired, *inter alia*, Station KTD 563 and that discontinuance, pursuant to Section 214 of the Act, has never been granted.

4. The basic statutory test to be applied by the Commission in considering applications for discontinuance of common carrier service is found in Section 214(a) of the Act. Pursuant thereto, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected by the proposed action." 47 U.S.C. § 214(a). Application of this standard presents the Commission with the task of balancing the burden that would be imposed on the carrier by operation of the facilities with the needs and interests of the user community.[7]

5. We conclude that operation of Station KTD 563 is not required by the Venice, Florida, user community and that a grant of discontinuance is justified pursuant to Section 214(a) of the Act. In this regard, we note that no user complaints have been filed in the period since Station KTD 563 ceased operations.[8] We also note the existence of alternative providers of Maritime Mobile Public Coast Service in the area and the presence of U.S. Coast Guard stations providing emergency communications services.[9]

6. However, while we conclude that discontinuance pursuant to the criteria set out in 47 U.S.C. 214(a) and applicable Commission precedent is in the public interest, we are troubled by the circumstances related in McCaw's application. Notwithstanding our conclusion that operation of Station KTD 563 is not required, the fact remains that station operations were discontinued unlawfully. Unlawful discontinuance is a serious matter, particularly in the case of Maritime Mobile Public Coast Service since licensees in this service owe particular duties both as common carriers and as providers of emergency services. *See, e.g.*, 47 C.F.R. § 80.301. Although in the instant case we conclude that the public interest is adequately served in the Venice area without the operation of Station KTD 563, that determination is ours alone to make and we cannot condone unilateral, unlawful actions by licensees which potentially pose grave risks to end users who need to use emergency communications facilities.

7. Although McCaw states that it was not the licensee when service at Station KTD 563 was unlawfully discontinued, this does not shield McCaw from liability. By its own admission, McCaw was, at best, ignorant of discontinuance until "only recently," yet McCaw acquired control of the licensee, pursuant to FCC authorization, in July 1986, *i.e.*, almost two years before appropriately informing the Commission. During that time, the licensee had an obligation to operate the station pursuant to the terms of the license. Yet Station KTD 563 has not been operated at all, and, apparently, it took McCaw almost two years to become aware of the discontinuance. Further, examination of the license for Station KTD 563 reveals that its term expired on April 9, 1987. Thus, there is little excuse for McCaw waiting until May 23, 1988 to seek formal discontinuance since the license, on its face, required some action, *i.e.*, formal renewal or formal discontinuance more than one year before McCaw filed its application. Given these facts, we cannot conclude that the licensee has adequately discharged its legal obligations and, while we grant McCaw's discontinuance request, we will not grant discontinuance *nunc pro tunc*.

8. Further, we will impose a forfeiture against McCaw for violation of Section 214(a) of the Act and pursuant to Section 1.80 of our Rules. Although unlawful discontinuance of a public coast station is a serious violation, we take into consideration the fact that McCaw reported this

matter to us shortly after discovering the discontinuance and the probability that the station was, in fact, discontinued before McCaw obtained control of MCI Airsignal. In this regard, we are troubled by McCaw's allegations concerning the culpability of MCI, which controlled the licensee prior to McCaw's acquisition. However, these allegations relate to conduct for which forfeiture penalties are, in any case, barred pursuant to the limitations provisions of 47 U.S.C. § 503(b)(6). Taking all these considerations into account, we impose a forfeiture of $1000 against McCaw.

9. Accordingly, IT IS ORDERED, pursuant to Section 214(a) of the Act, that McCaw's Application to Discontinue Service at Maritime Mobile Public Coast Station KTD 563, Venice, Florida IS GRANTED in part and DENIED in part.

10. IT IS FURTHER ORDERED, pursuant to Section 1.3 of the Commission's Rules that McCaw's Request for Waiver of Section 63.90 of the Commission's Rules IS GRANTED.

11. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules that McCaw is apparently liable for a forfeiture of $1000 for willfully and repeatedly violating Section 214(a) of the Act.

12. IT IS FURTHER ORDERED, that a copy of this Notice of Apparent Liability for forfeiture shall be sent by certified mail, return receipt requested, to McCaw.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Station KTD 563 is authorized to serve an area in Florida from Palmetto in Manatee County through Sarasota County to Point Charlotte in Charlotte County.

[2] On August 1, 1988, McCaw filed a Request for Waiver of Section 63.90 of the Commission's Rules in order to avoid the publication and posting of notices requirement of that section. Because we grant, in part, McCaw's application we also grant McCaw's waiver request.

[3] McCaw Application at 2.

[4] McCaw incorrectly identifies this as Station KWB 426 in its application.

[5] According to Commission records, the license for station KTA 420 has expired. The Special Services Division, Private Radio Bureau currently is investigating the licensee's intention to renew.

[6] McCaw Petition at 3.

[7] Public Coast RadioTelegraph Stations, 67 FCC 2d 791, 795 (1978).

[8] Commission records do indicate that one informal inquiry regarding the status of Station KTD 563 has been received.

[9] Besides the three alternative providers with unexpired licenses correctly identified in paragraph 3, *supra*, at least two new area licenses have been granted in the past several months.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ITT COMMUNICATIONS AND
INFORMATION SERVICES, INC.,
Complainant,

v. File No. IC-89-01380

BELLSOUTH,
Defendant.

ORDER

Adopted: December 14, 1988; Released: January 12, 1989

By the Chief, Enforcement Division, Common Carrier Bureau:

1. ITT Communications and Information Services, Inc. (ITTCOINS) filed an Informal Complaint with the Commission on December 12, 1988 alleging that BellSouth and its exchange carrier subsidiaries, Southern Bell and South Central Bell, were refusing to list two ITTCOINS subsidiaries on the public pay telephone presubscription ballots to be mailed on or about January 1, 1989 unless one of the subsidiaries was listed without reference to ITT.

2. During discussions with ITTCOINS and BellSouth representatives in the Enforcement Division offices on December 14, 1988, BellSouth was advised that insufficient basis had been provided to justify a failure to list both ITT Communication Services, Inc. (ITTCSI) and ITT Chernow Communications, Inc. (ITT Chernow) by their full names on BellSouth's presubscription pay telephone ballot. The decision was based on the fact that the two subsidiaries serve different markets, have separate offices, separate officers and different rates. In effect, they are operated like two distinctly separate entitites as opposed to one entity providing different services. This situation appears to be unique in the industry, and at variance with a situation where a single carrier might attempt to place its name on a ballot more than once.[1]

3. During the meeting, BellSouth expressed concern about possible violations on its part of the Communications Act or the Commission's balloting and allocation rules. It is our determination that listing the two separate interstate interexchange subsidiaries, in their chosen names, in these particular circumstances is in compliance with the Communications Act and the Commission's rules adopted in CC Docket No. 83-1145, Phase I, 101 FCC 2d 911 (1985). BellSouth also expressed concern whether it would be necessary to survey other interexchange carriers, in order to assure compliance with nondiscrimination responsibilities under Section 202 of the Act. BellSouth noted it would be unable to meet the January 1, 1989 court deadline if it were requested to perform such a survey. BellSouth stated that no other interexchange carrier had approached it with a request similar to that of ITTCOINS. In view of the above, and because we have concluded that ITTCOINS' two subsidiaries represent a unique situation, we find that BellSouth has not acted unreasonably and should not be required to perform a survey of other carriers providing interexchange service in its balloting area.

4. On the basis of the outcome of the settlement negotiations and the issuance of this Order, we have concluded that there are no longer any issues remaining and the proceeding should be terminated.

5. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, that BellSouth Corp. SHALL INCLUDE both ITTCOIN's subsidiaries on its public pay telephone presubscription ballots to the extent ordered herein.

6. IT IS FURTHER ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the above-captioned complaint IS DISMISSED WITH PREJUDICE.

7. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] At the time discussions were held on December 14, 1988, BellSouth stated that of its 22 access tandems to be balloted, ballots for seven of those tandems had already been printed and were ready to be mailed. ITT Corporation had intended for its two interexchange subsidiaries, ITTCSI and ITT Chernow, to participate in the balloting process in four of those seven tandems: *i.e.*, Mobile, Alabama; Baton Rouge, Louisiana; Gulfport, Mississippi; and, Knoxville, Tennessee. ITTCOINS requested a reprint of the ballots for all four of these tandems. BellSouth represented that it could not reprint the ballots for these four tandems because such an undertaking would seriously jeopardize meeting the January 1, 1989 deadline imposed by the United States District Court for the District of Columbia's (Court) Order in Civil Action No. 82-0192, filed October 14, 1988, for mailing interexchange carrier selection ballots to all public telephone premises owners. ITTCOINS emphasized that the Knoxville, Tennessee tandem was a major market for its two interexchange carriers. ITTCOINS stated it would accede to not reprinting the ballots for the other three tandems, but requested a reprint of the Knoxville market. Based on these negotiations, BellSouth agreed to reprint only the Knoxville, Tennessee tandem ballots.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN NETWORK, INC.

Petition for Declaratory Ruling
Concerning Backbilling of Access
Charges

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1988; Released: January 12, 1989

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. On October 5, 1987, American Network, Inc. (AmNet) filed a petition for a declaratory ruling concerning the backbilling of access charges by local exchange carriers (LECs), and other matters. Thirty-three initial comments and 17 reply comments were filed.[1] Amnet asks the Commission to issue a declaratory ruling that:

(a) LECs must abide by the provisions of relevant access tariffs requiring them to bill interexchange carriers (ICs) on a prompt and current basis;

(b) irrespective of relevant access tariff provisions, carriers must bill on a current basis;

(c) charges incurred more than 60 days prior to a bill date may not be billed; and

(d) losses incurred due to such disallowed charges must be borne by the billing carrier (*i.e.*, by its stockholders) rather than spread among the carrier's ratepayers.

2. AmNet also alleges that facilities-based ICs routinely backbill for the lease of their facilities and, accordingly, AmNet asks that the Commission declare backbilling by such ICs to be unlawful to the same extent as backbilling by LECs.[2]

3. AmNet generally defines routine backbilling as the repeated failure to bill an IC on a prompt and current basis. [3] According to AmNet, instances of "egregious backbilling" of a year or more are not uncommon. It asserts that sometimes LECs bill as much as two years after charges are incurred.[4] AmNet claims that it encounters such backbilling with each of the LECs with which it interconnects and that such backbilling is widespread.[5]

4. AmNet submits that several problems arise for ICs as a result of backbilling. First, an IC's ability to bill its own customers in a timely manner is jeopardized.[6] Second, backbilling by LECs causes ICs to incur unexpected and unplanned costs -- particularly if the backbilled access charges consist of usage sensitive charges.[7] Furthermore, argues AmNet, when such backbilling becomes routine, planning and efficient operation of the IC's business become impossible. AmNet claims in many such cases an IC has no choice but to bear the various costs which have been imposed by the LEC's delay in providing accurate billing information.[8] It also claims that actual and potential competition between LECs and ICs creates an incentive for LECs to hamper IC operations. It suggests that LECs can engage in routine backbilling to achieve this result. AmNet claims these factors discourage LECs from providing ICs with timely, accurate bills and that only Commission intervention will cure the problem. In making these allegations, however, AmNet fails to identify the LECs with which it interconnects or to document the alleged widespread nature of the problem. Nor does AmNet quantify the financial impact of the problem or provide examples of the anti-competitive behavior alleged.

5. AmNet argues that backbilling is prohibited by current tariffs and should therefore be prohibited and penalized by the Commission. AmNet cites the provisions of Section 203(c)(3) of the Communications Act, 47 U.S.C. § 203(c)(3), which require common carriers to comply with the terms of their tariffs.[9] AmNet then states that, to the best of its knowledge, all LEC access tariffs require that access charges be billed on a "current basis." As LECs do not always bill on a "current basis," AmNet asks the Commission to enforce Section 203(c)(3) by defining the phrase "current basis" to require all LECs to bill on that basis regardless of whether their tariffs contain such language. And, says AmNet, the Commission should penalize LECs who are unable or unwilling to comply.

II. COMMENTS IN SUPPORT OF PETITION

6. Seventeen parties filed comments in full or partial support of AmNet's petition.[10] These parties report backbilling problems similar to those noted by AmNet as well as other billing problems. However, except for one example provided by Ad Hoc Alliance,[11] those parties supporting AmNet's petition do not provide any examples of backbilling by LECs or otherwise substantiate their claims.

7. In lieu of the 60-day rule proposed by AmNet, MCI suggests a 90-day rule and Ad Hoc Alliance suggests an alternate method for penalizing LECs who backbill. The Northwest Telecom Group claims that since some ICs, presumably the smaller ones, are subject to routine backbilling of access charges and that other ICs, presumably the larger ones such as AT&T, do not face the problem, the smaller ICs are subject to discrimination that violates Section 202(a) of the Communications Act, 47 U.S.C. § 202(a).[12] However, none of these ICs provides any examples or other evidence to document these discrimination claims.

III. OPPOSITIONS TO PETITION

8. Sixteen parties filed comments opposing AmNet's petition.[13] The first substantive claim raised by the opposing commenters is that backbilling is authorized by Section 415 of the Communications Act, 47 U.S.C. § 415.[14] USTA states that this section allows carriers up to two years to seek recovery of their lawful charges. USTA argues that this provision exists to deal with the situations such as the complex billing arrangements which are the subject of AmNet's petition, that a 60-day limitation on billing would be unnecessarily restrictive, and that such a limitation would effectively amend Section 415.[15] AT&T,

NYNEX, and Centel make similar arguments with regard to the application of Section 415.[16] Second, several commenters claim that granting some ICs free service as a result of late bills for such service would violate the anti-discrimination provisions of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a).[17]

9. Third, several commenters caution that AmNet has taken the "current basis" language out of context and that such language was not intended to apply to all access services.[18] Fourth, opposing commenters claim that any backbilling which does in fact occur is not significant[19] or is the fault of others (including in some cases the ICs themselves)[20] and they dispute the existence of any intentional backbilling for anti-competitive or any other purposes.[21] They also assert that AmNet need not rely on LEC access bills for customer billing because it likely has better internal sources of such billing information.[22] LEC commenters argue that backbilling confers a financial benefit on AmNet and other ICs by providing the equivalent of an interest-free loan.[23] Fifth and finally, they submit that the forfeiture provisions of the proposed 60-day rule are confiscatory.[24]

10. In addition to their substantive opposition, several commenters claim that AmNet erred in petitioning for a declaratory ruling. Such commenters claim that AmNet should first file complaints against the LECs and that a petition for Rule Making is the only proper vehicle to establish a 60-day limit for backbilling because the Commission could not adopt the proposed 60-day rule under Section 205(a) of the Act, 47 U.S.C. § 205(a),[25] without further notice to interested parties and a full hearing.[26]

IV. REPLIES

11. AmNet and eight other parties filed reply comments supporting the petition.[27] The AmNet reply responds that billing requirements and the statute of limitations included in Section 415 are two separate and distinct matters.[28] In addition, both AmNet and the Northwest Telecom Group note that Section 415 speaks to the collection of "lawful" charges and argue that backbilled charges are not lawful and are therefore not covered by Section 415.[29]

12. AmNet and others renew their claims that backbilling is "far from insignificant from the standpoint of the affected ICs."[30] In response to assertions that it has not adequately substantiated its damages, AmNet argues, first, that this is not a complaint proceeding in which damages must be proven and, second, that it is not willing to release competitively sensitive information in this proceeding.[31] However, AmNet does use some of the backbilling percentages provided by a few of the LECs as further support for its claims. While these percentages appear small, AmNet asserts that the dollar amounts involved are often significant and that these amounts have a disproportionate impact on smaller ICs.[32]

13. AmNet again asserts that the LECs' have anti-competitive motives for backbilling.[33] It responds to assertions that it need not rely on access bills to bill its own customers, by conceding such assertions are "partially correct," but insists that there is still critical cost information which is only available from such access bills.[34] Next, AmNet rejects the contention that backbilling provides an IC with an interest-free loan. AmNet claims that resellers cannot forecast their access costs with precision. As such, it is not possible for them to set aside cash reserves prior to payment of a late access bill.[35]

14. Finally, Ad Hoc Alliance and Northwest Telecom reject the claims of some commenters that enforcement of the proposed 60-day rule would be confiscatory. These replies observe that any loss incurred by a LEC under such a rule would be attributable to the LEC's own inefficiency and that, while the LECs are to be provided a reasonable opportunity to earn adequate revenues with efficient operations, no particular rate of return is guaranteed.[36] In response to the charge that the proposed 60-day rule would violate Section 202(a) because of alleged discrimination, Ad Hoc Alliance and others argue that only unreasonable discrimination is prohibited by that section.[37]

15. AmNet and others also dispute claims that the petition for a declaratory ruling is inappropriate.[38] AmNet defends its pursuit of a declaratory ruling rather than prosecution of complaints or Rule Making because, in AmNet's view, complaints against all relevant LECs would be "unduly burdensome" and a Rule Making is not needed because it is not requesting that the Commission adopt any new rules.[39] Citing cases, the Ad Hoc Alliance and Northwest Telecom Group reject the claim that Section 205(a) bars granting the petition without further notice and a full hearing.[40]

16. Seven LECs[41] filed reply comments in opposition to AmNet's petition. Those replies repeat earlier claims that Sections 202(a) and 415 bar the relief AmNet seeks.[42] Those replies contend that AmNet fails to document the backbilling problems alleged, that the proposed rule would be confiscatory and would confer an unjust windfall on the ICs – particularly when bills are delayed through no fault of the LECs, and that ICs such as AmNet have or could easily develop internal sources for the usage information contained in access bills. Finally, the LECs again assert that a declaratory ruling is not appropriate and that other procedural remedies are adequate. Some LECs indicate that they are moving unilaterally to improve access billing procedures[43] and that they are willing to negotiate special arrangements with ICs when significant backbilling occurs.[44]

V. DISCUSSION

17. While AmNet and others strongly assert that backbilling is a serious problem, this record provides very little concrete evidence to support their claims. Accordingly, we are unable to understand the specific nature and extent of the backbilling problem, much less adopt an appropriate remedy. AmNet offers two explanations for failing to provide such evidence: first, that we do not need such information because this is not a complaint proceeding and, second, that it cannot submit more specific evidence of backbilling because such evidence would include confidential information. We reject each of these explanations.

18. A declaratory ruling may be used to resolve a controversy if the facts are clearly developed and essentially undisputed. The petitioner in such a proceeding must provide sufficient information to enable the Commission to resolve the controversy in a meaningful manner. AmNet has failed to do so. Moreover, we agree with

commenters who contend that any fixed limit upon all backbilling should be established in a Rule Making proceeding rather than a declaratory ruling proceeding.

19. The pleadings do, however, reveal one relatively concrete controversy that can be resolved through a declaratory ruling. Many carriers apparently believe that Section 415(a) of the Communications Act confers a right to bill for past services for up two years. AmNet and others contend that this carrier interpretation of Section 415(a) is incorrect. We agree. Section 415(a) establishes a time limit for filing a court action to recover unpaid bills; it does not establish the time limit for sending an initial bill to the customer for services rendered.[45] A delay of much less than 24 months between the rendering of service and the receipt of an initial bill for such service may be an unjust and unreasonable practice for purposes of Section 201(b) of the Act.

VI. CONCLUSION

20. Accordingly, we must deny much of the relief requested in the petition without reaching the issues whether backbilling may in some cases violate the Communications Act; whether backbilling of some ICs and not others might constitute unreasonable discrimination in violation of Section 202(a); whether the remedies sought by AmNet and others would be appropriate under applicable laws and regulations; and whether the Commission has the authority to grant the relief requested without a formal Rule Making. However, in response to AmNet's request for clarification in this area, we declare that backbilling may under certain circumstances constitute an unjust and unreasonable practice in violation of Section 201(b) and that Section 415 does not authorize backbilling for any particular period.

21. Accordingly, IT IS ORDERED that the petition for declaratory ruling filed by American Network, Inc., IS GRANTED to the extent indicated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Comments on the AmNet petition were filed on December 1, 1987, and replies were filed on December 22, 1987. *See* Public Notice, DA 87-1492, released Oct. 14, 1987; Public Notice, DA 87-1799, released Dec. 11, 1987.

[2] AmNet Petition at 3 n.4. Accordingly, references in this Order to backbilling by LECs includes backbilling by ICs unless the context otherwise indicates.

[3] AmNet Petition at 1. AmNet defines "backbilling" more specifically as "the LECs' practice of billing for previously unbilled access services which were rendered more than 60 days prior to the bill date." *Id.* at 2 n.3.

[4] *Id.*; *id.* at iii.

[5] *Id.* at 4.

[6] *Id.* at 15-16.

[7] *Id.* at 6.

[8] *Id.* at 14.

[9] Section 203(c)(3) of the Communications Act, 47 U.S.C. § 203(c)(3), provides as follows:

> [N]o carrier shall . . . extend to any person any privilege or facilities in such [carrier's] communication, or employ any classifications, regulations, or practices affecting . . [its] charges, except as specified in such [carrier's tariff].

[10] Supporting comments were filed by: MCI Telecommunications Corp. (MCI); ALC Communications Corporation; Northwest Telecom, Ltd. (Northwest Telecom); Ad Hoc Alliance of Small Interexchange Carriers (Ad Hoc Alliance); LDS-Baton Rouge, Inc.; LDS-Natchez, Inc.; LDS-Alexandria, Inc.; LDS-Monroe, Inc.; LDS-Longview, Inc.; LDS-Oklahoma City, Inc.; LDS-Shreveport, Inc.; LDS-Tulsa, Inc.; Tel America; Express Tel; Communigroup of Kansas City, Communigroup of Jackson, Inc., and Communigroup of the Gulf Coast. With minor variations, the comments of the last 13 parties duplicate the comments of Northwest Telecom. Hereinafter we describe all of these parties as the Northwest Telecom Group.

[11] Ad Hoc Alliance notes that in one instance involving Ohio Bell, the LEC issued an access bill dated October 17, 1987, which contained charges for usage in June and July 1986. While the billing appeared to take over one year in this case, an amount of less than $5.00 was involved. Ad Hoc Alliance Comments at 2.

[12] Northwest Telecom Group Comments at 8.

[13] The following parties filed comments in opposition to AmNet's petition: American Telephone and Telegraph Company (AT&T); Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West); Southwestern Bell Telephone Company (SWB); Pacific Bell and Nevada Bell (PacTel); New England Telephone and Telegraph Company and New York Telephone Company (NYNEX); Bell Atlantic Telephone Companies (Bell Atlantic); Ameritech Operating Companies (Ameritech); BellSouth Telephone Companies (BellSouth); GTE Telephone Companies (GTOC); United Telephone System Companies (UTS); Contel Corporation (Contel); Central Telephone Company (Centel); Cincinnati Bell Telephone Company (Cincinnati Bell); National Exchange Carrier Association, Inc.(NECA); Rochester Telephone Corporation (Rochester); and the United States Telephone Association (USTA).

[14] Section 415 of the Communications Act, 47 U.S.C. § 415, provides in relevant part as follows:

> All actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun, within two years from the time the cause of action accrues, and not after.

[15] USTA Comments at 3-4.

[16] AT&T Comments at 2-3; NYNEX Comments at ii, 13-14; Centel Comments at 3-6.

[17] *See, e.g.*, GTOC Comments at 5; BellSouth Reply at 4 n.5; US West Comments at 16.

[18] *See, e.g.*, UTS Comments at 3-4; US West Comments at 10-12.

[19] *See, e.g.*, US West Comments at 2, 10; NYNEX Comments at i, 3-4.

[20] *See* NYNEX Comments at 3; Cincinnati Bell Comments at 1-2.

[21] *See* US West Comments at 3-4; Centel Comments at 4-5.

[22] *See* Ameritech Comments at 8; BellSouth Comments at 7; Contel Comments at 3; SWB Comments at 6-7.

[23] *See* PacTel Comments at 5; Ameritech Comments at 3,4; Bell Atlantic Comments at 2.

[24] *See* Ameritech Comments at 7; US West Comments at 17; Rochester Comments at 12; SWB Comments at 2.

[25] Section 205(a) of the Communications Act, 47 U.S.C. § 205(a), provides, in part, as follows:

> Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of [the] opinion that any . . . classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe . . . what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

[26] *See* BellSouth Comments at 4-5; US West Comments at 14.

[27] The following parties filed reply comments supporting the petition: AmNet, Ad Hoc Alliance, MCI, Northwest Telecom, Communigroup of Kansas City, ExpressTel, TelAmerica, Communigroup of the Gulf Coast, and Communigroup of Jackson. With minor variations the reply comments of the last five parties duplicate the reply comments of Northwest Telecom. We refer to these parties as the Northwest Telecom Group.

[28] AmNet Reply at 33-36.

[29] *See id.*; Northwest Telecom Group Reply at 3-5.

[30] AmNet Reply at 15-16.

[31] *Id.* at 12-13.

[32] *Id.* at 15.

[33] *Id.* at 20-22.

[34] AmNet provides two examples of such unique information: first, the actual traffic pattern information needed to apply the premium/non-premium differential and second, the distance-sensitive local transport charge. *Id.* at 16, 17.

[35] *Id.* at 19-20.

[36] *See* Ad Hoc Alliance Reply at 5-6; Northwest Telecom Group Reply at 7-8.

[37] *See* Ad Hoc Alliance Reply at 3-5.

[38] *See* AmNet Reply at 10-12; Ad Hoc Alliance Reply at 6-8; Northwest Telecom Group Reply at 8-9.

[39] *Id.* at 10-11.

[40] *See* Ad Hoc Alliance Reply at 6-7; Northwest Telecom Group Reply at 5-7.

[41] The following LECs filed reply comments in opposition to AmNet's petition: PacTel, SWB, NYNEX, BellSouth, Rochester, US West, and Ameritech.

[42] *See, e.g.*, SWB Reply at 5.

[43] *Id.* at 6 n.9.

[44] *See* NYNEX Comments at 6 n.6; Ameritech Comments at 3.

[45] We find nothing in the legislative history to suggest that this section was intended to allow carriers to delay bills for up to two years after services have been rendered. *See, e.g.*, Senate and House Reports on the 1974 amendment extending the limitation period from one to two years. Senate Report 93-796, Apr. 30, 1974, and House Report 93-1421, Oct. 3, 1974 (both reports to accompany S. 1227).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEW YORK TELEPHONE AND
NEW ENGLAND TELEPHONE AND
TELEGRAPH COMPANY

Comparably Efficient Interconnection
Plan for the Provision of Voice
Messaging Services

MEMORANDUM OPINION AND ORDER

Adopted: December 28, 1988; Released: January 12, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On June 21, 1988, pursuant to the requirements of the *Computer III* proceeding,[1] New York Telephone Company and New England Telephone and Telegraph Company (NYNEX) filed a Comparably Efficient Interconnection (CEI) Plan (the plan) for Voice Messaging Services (VMS). VMS is an enhanced service that provides business and residence customers with the ability to receive, store and retrieve telephone messages.[2] Ten parties filed comments on the plan, and three parties filed replies. [3] As described below, we conditionally approve the plan.[4]

II. BACKGROUND

2. The *Computer III* decision requires a BOC that wishes to offer an enhanced service, or class of enhanced services, on an unseparated basis prior to implementation of a comprehensive Open Network Architecture (ONA) plan to submit and obtain approval of a CEI plan for the specific services it proposes to offer. Such a plan must meet the CEI requirements established in the *Computer III* proceeding, as well as other nonstructural safeguards governing the use of customer proprietary network information (CPNI), disclosure of network information, and nondiscrimination reporting.[5]

III. SERVICE DESCRIPTION

3. NYNEX's proposed VMS will allow subscribers to receive messages and to originate and distribute messages using voice storage equipment that is interconnected to the telephone network using standard interfaces.[6] As described in the plan, NYNEX's proposed VMS has two applications: call answering and voice mail. The call answering application provides automated telephone answering for a subscriber whose line is busy or does not answer. The caller can record a message for the subscriber, who can subsequently retrieve the message from any touchtone phone.[7] A stutter dial tone notifies a subscriber of a waiting message.

4. The voice mail application provides answering and message storage and can be used by a caller to leave a message in a subscriber's "voice mailbox" for later retrieval by a voice mail customer. In this application, a caller dials the VMS directly with the intent of leaving a message rather than speaking directly to the called customer.[8] To use the voice mail application, a subscriber calls the access number of the voice messaging machine and enters a valid pass code. At that time, the VMS prompts the customer to retrieve messages, send messages, or exercise a variety of other options. The message is retrieved in the same manner as described above for call answering.[9] In both applications, the subscriber needs a touchtone telephone and a voice-grade subscriber line between its premise and the serving central office.[10]

5. NYNEX claims that its plan is very similar to the approved CEI plan of Pacific.[11] NYNEX maintains that no issues of substance are raised by its plan that have not been resolved by the Commission already. NYNEX urges expeditious approval of its plan.[12] NYNEX argues that any delay in the approval of its plan will be at the expense of customers who stand ready to subscribe to VMS.[13]

IV. COMPLIANCE ISSUES

A. CEI Requirements

1. Proposed CEI Arrangements

6. NYNEX says that it will not physically integrate its VMS equipment into its central office equipment. Instead, it will interconnect VMS equipment to the telephone network using the same existing standard interfaces and tariffed transmission offerings that will be used by other voice messaging providers.[14] NYNEX says that it may use the following existing tariffed services to interconnect its voice messaging systems to the telephone network: business exchange access lines; centrex lines; foreign exchange lines; direct inward dial trunks; multi-line hunt groups; and call distribution with queuing.[15] In addition, NYNEX says that its VMS offering may avail itself of the following basic services when those services are made generally available to others: call forward/busy line/don't answer (CFBLDA), Simplified Message Desk Interfaces (SMDI) and Trunk Side Access.[16] SMDI, says NYNEX, is not currently generally available. However, it anticipates making SMDI available in selected offices, as "technology allows", by the first quarter of 1989 or earlier.[17] Trunk Side Access, it says, is currently under development and will be scheduled for deployment in 1989.

2. CEI Parameters

7. The *Phase I Order* lists nine CEI parameters.[18] Commenters raise issues with respect to four of them: interface functionality, unbundling, CEI availability, and minimization of transport costs.[19]

a. Interface Functionality

8. As part of its CEI offering, a BOC must provide standardized hardware and software interfaces that support transmission, switching, and signaling functions identical to those utilized in its own enhanced service offering. The information and technical specifications for such interfaces are subject to the Commission's network information disclosure requirements.[20]

(i) Positions of the Parties

9. ANPA questions whether we should approve the CEI plan before NYNEX actually discloses the Trunk Side Access specification.[21] ANPA and OMNI claim that without more information, we cannot presently evaluate whether the specifications for Trunk Side Access will have a neutral competitive effect.[22]

10. In addition, OMNI asserts that NYNEX has restricted SMDI to operate only on an intra-office basis, forcing other ESPs to arrange for interconnection at each end office that they desire to provide service.[23] OMNI says that this is an unnecessary and unreasonable technical restriction that violates the requirement that the ESP interconnection be "completely efficient", like that afforded the BOCs' own enhanced operations.

(ii) Discussion

11. Although NYNEX emphasizes that it will not avail itself of any basic service until it is made generally available to others, it fails to provide any technical description of at least one underlying basic service, Trunk Side Access, that may prove to be a valuable interface for its own VMS operations as well as that of competing ESPs. We note that even its projected date of deployment for this service is apparently subject to technological uncertainties that could conceivably affect its commercial availability. We require NYNEX to file an amendment to its plan by February 15, 1989, to provide further details on the technical characteristics of and projected deployment schedule for this service. To the extent that the technical specifications of any existing services or unbundled versions of existing services change, NYNEX is subject to our network disclosure rules to provide the relevant technical information prior to the use of such services. Subject to these conditions, we find NYNEX's explanation of its treatment of interface functionalities to be sufficient.[24]

b. Unbundling

12. The basic services and basic service functions that underlie a BOCs' enhanced service offering must be unbundled from other basic service offerings and associated with a specific tariffed rate element.[25] NYNEX says that it has unbundled all basic services and functions that its VMS affiliate will use to the extent that such services and functions are functionally useful to ESPs and end users.[26] NYNEX states further that all basic services underlying its VMS are currently available under tariff, or will be available under tariff, to NYNEX and other VMS providers in the same time frame. NYNEX says it will not use any network functions for its VMS that are not available to all VMS providers at the same time under the same terms and conditions.

(i) Positions of the Parties

13. OMNI states that NYNEX has not unbundled charges associated with the intra-office switching function associated with the call forwarding operation from its overall local calling services tariff.[27] OMNI says that if full local calling charges are imposed for call forwarding transactions that involve only minimal additional intra-office switching, the charges imposed will be excessive and unreasonable. MCI states generally that NYNEX does not adequately unbundle network services.[28]

14. The NYNEX reply repeats that all basic services and functions that will be used in its VMS have been unbundled to the extent that these services and functions are useful to ESPs and end users.[29] NYNEX says that to the extent basic services underlying its VMS are currently available under tariff, it will make available full pricing and service information on a timely basis through NYNEX's ongoing dialogue with the ESP industry, and through the tariff filing process. Finally, NYNEX reiterates that it will not use any network functions for its VMS that are not available to all VMS providers at the same prices, terms, conditions, time frames, and locations.[30]

(ii) Discussion

15. NYNEX has complied with the requirement that it unbundle the basic services to be used in its VMS service from other basic services. From a functional standpoint, it is offering to others the same basic services that it will provide to its own enhanced service operation. Even under the general ONA requirements, NYNEX would not be compelled to unbundle its entire ensemble of network services when to do so would create inefficiencies from unnecessarily bundled or splintered services.[31] For CEI purposes a BOC must only make available to others the same basic services that it uses, and NYNEX proposes to do so. Neither OMNI nor MCI has shown that further unbundling by NYNEX is required to satisfy CEI requirements. Thus, we approve this part of the plan.

c. CEI Availability

16. A BOCs' CEI offering must be fully operational when the BOC offers its corresponding enhanced service to the public. In addition, the BOC must provide an opportunity for enhanced service competitors to use CEI facilities and services for testing purposes before the BOC makes its enhanced service public offering.[32]

17. NYNEX states that it plans to provide VMS in the New York metropolitan local area transport access (LATA) and the Boston LATA in the fourth quarter of 1988 or the first quarter of 1989, and plans expanded deployment in selected offices throughout its region in accordance with market demand and technical feasibility.[33] NYNEX says that CEI for VMS will be fully operational and available to all ESPs before it will offer its own VMS service. Most of the elements that NYNEX designates as CEI for VMS are already generally available.[34] Those that are not, such as SMDI, CFBLDA, and Trunk Side Access, says NYNEX, are under development and will be available in selected end offices that will be well publicized.[35] NYNEX reiterates that it will not use such services until those services are made available to all ESPs.

(i) Positions of the Parties

18. ANPA and MCI claim that NYNEX should provide a testing period for SMDI by other service providers before it introduces its own service.[36] Absent this safeguard, ANPA says that other ESPs will be unfairly disadvantaged in their ability to use CEI functionalities. ANPA, ATSI, and OMNI further claim that NYNEX fails to disclose those wire centers or central offices that will have CEI capabilities, and does not describe its plans for the introduction of CEI capabilities in other parts of its service area.[37] ATSI contends that permitting NYNEX to control the timing and location of deployment of the

basic services underlying its VMS creates significant competitive advantages for NYNEX's affiliated operations.[38] In addition, according to OMNI, the geographic availability of NYNEX's basic CEI service is quite limited.[39]

19. ATSI also expresses concern that while NYNEX states that its affiliated VMS operations "will not utilize [VMS] services until they are made available to all ESPs," NYNEX nevertheless plans to begin providing VMS as early as the fourth quarter of 1988.[40] Specifically, ATSI says that NYNEX "aim[s] to conduct a technical trial with a large prospective VMS customer" in the fourth quarter of 1988 that presumably involves these services. ATSI says that NYNEX's plan to make BSEs available in selected offices is unacceptable to its membership.[41] ATSI says that its members -- not NYNEX -- are best able to determine whether the switch locations chosen by NYNEX are responsive to ESP needs.[42]

20. NYNEX replies that ATSI's concerns are unwarranted. NYNEX says that it would not conduct any VMS marketing trial, or otherwise market VMS, absent our approval of its CEI plan. In any event, it says, for independent technical reasons, it no longer plans to conduct the trial ATSI describes.

(ii) Discussion

21. NYNEX's plan generally satisfies this requirement by making CEI available to competitors in those areas in which NYNEX will provide its enhanced service. However, because NYNEX apparently intends to limit CEI availability to those locations where its VMS will be deployed, adequate information about its deployment plans is especially important. Therefore, if NYNEX intends to expand its initial VMS deployment area, it must update its plan in advance of such deployment and specify the expanded deployment area. Finally, we require that NYNEX clarify its plan to specify that a reasonable testing period for CEI services, prior to their deployment, will be available for competing providers of VMS services.[43] Subject to these conditions, we approve this part of the plan.

d. Minimization of Transmission Costs

22. The *Phase I Order* recognized that the BOCs may reduce or eliminate certain equipment and transmission costs by collocating or integrating enhanced services facilities with their basic network facilities. While the Commission did not require the BOCs to permit ESPs to collocate equipment on BOC premises, the Commission did require the BOCs to minimize transmission costs for non-collocated ESPs. The *Phase I Reconsideration* clarified that this requirement focuses on technological methods of reducing transmission costs, and does not require a CEI offering that is substantially identical to existing services to be priced lower than those services simply for CEI purposes. The *Phase II Reconsideration* clarified that a BOC may satisfy this CEI requirement if it charges itself an access link rate that is the same as that paid by non-collocated enhanced service providers, provided that the access connections in each case are equivalent in technical quality.[44] NYNEX says that for interoffice transport and usage, it will subscribe to the same tariffed arrangements under the same terms, prices, and conditions available to all ESPs. Thus, it says, it will pay the same rates for CEI services that ESPs pay.[45]

(i) Positions of the Parties

23. MCI asserts that NYNEX has not attempted to minimize transmission costs for unaffiliated ESPs. Although equivalence removes one important source of discrimination and anticompetitive abuse, MCI contends that achieving price parity is not equivalent to affirmatively reducing other firms' access and transmission costs.[46]

24. OMNI also argues that NYNEX has not adequately addressed this parameter.[47] First, it says, NYNEX's proposal that ESPs maintain separate points of interconnection at each end office in which service is to be provided (rather than using the equivalent of an access tandem to provide for more concentrated interconnection) will result in increased transmission costs. Second, says OMNI, the NYNEX plan contains no recognition of the significantly lower costs associated with completing forwarded calls on an intraoffice basis compared to those associated with interoffice network transport.

25. NYNEX replies that its VMS affiliate will be subject to the same tariffed prices and terms for interoffice transport and usage as will all ESPs.[48] NYNEX emphasizes that even MCI acknowledges that price parity for transport costs satisfies the CEI requirements.[49] NYNEX characterizes MCI's assertion that the Commission should re-evaluate the requirement and direct carriers to lower other firms' access and transport costs as an untimely and unwarranted request reconsideration of the CEI parameter on minimization of transport costs.[50]

(ii) Discussion

26. NYNEX has complied with this CEI parameter since it will charge itself the same tariffed rates for CEI services as it charges all other VMS providers. While OMNI makes some arguments about the technical characteristics and efficiency of possible CEI services, we see no reason to require NYNEX to satisfy this parameter through somewhat uncertain technical means rather than through price parity -- a means that the Commission has specifically endorsed in the *Computer III* Rule Making proceeding and, in a CEI context, in the *Pacific Order*.

B. CEI Pricing

27. The *Phase I Order* established pricing standards for the interconnection, concentration, and transmission aspects of CEI services. NYNEX encloses with its plan tariff references for many of its CEI services.[51]

1. Rate Information

a. Positions of the Parties

28. Parties object to the absence of information on the rates for SMDI, CFBLDA, and Trunk Side Access. ATSI says that such an omission is improper, and that pricing information is central to determining whether NYNEX's CEI offering will be of any value to competing VMS providers.[52] OMNI states that NYNEX's plan omits any discussion of the charges applicable for calls forwarded from an end user to the VMS provider on an intraoffice basis.[53]

b. Discussion

29. The *Phase I Order* requires the BOCs to file sample tariffs with their CEI plans.[54] Accordingly, to the extent that NYNEX will be offering previously untariffed ser-

vices such as CFBLA, SMDI, and Trunk Side Access, it must file sample tariffs for these services by February 15, 1989. We will examine that filing to assure that NYNEX is complying with CEI requirements.

2. Federal Tariffing

a. Positions of the Parties

30. Several parties state that the CEI services in the plan should be tariffed at the federal level as well as with the states. For example, ATSI notes that an attachment to the NYNEX plan lists various state tariffs for CEI access and functions. ATSI concludes that NYNEX apparently will not include such access and functions in its federal tariffs and urges the Commission to require federal tariffing to ensure nondiscriminatory pricing.[55]

31. AT&T says that offering all BSEs in state tariffs is contrary to the Commission's finding that interexchange transmission of signals and other information associated with BOC BSEs is critical to the efficient operation and uniformity of ONA on a national scale.[56] For interexchange carriers (IXCs) to provide such interexchange transmission, says AT&T, all BOCs must offer the BSEs in interstate access tariffs.[57]

32. MCI contends that implementing the NYNEX plan through intrastate tariffs violates fundamental jurisdictional principles and violates NYNEX's commitment "to file new ONA services used for interstate purposes in the federal jurisdiction."[58] MCI contends that the market for information services is regional, if not national, in scope and CEI services should accordingly be included in interstate tariffs, just as local exchange carriers file intrastate and interstate tariffs for exchange access services. MCI states that if the basic services underlying NYNEX's VMS are tariffed only at the state level, we will have no way of monitoring compliance with the pricing rules.

33. NYNEX replies that the Commission has already appropriately rejected the position that CEI unbundled basic network capabilities should be made available to IXCs under interstate access tariffs. NYNEX adds that many ESPs currently use NYNEX's local business lines and pay intrastate rates for their switched access connections to NYNEX's central offices, even when the ESPs are providing interstate service. NYNEX says that it does not prohibit interstate use of facilities that are currently available for VMS, and the commenters do not indicate any detriment that could occur from the unavailability of interstate BSEs for use with VMS. In any event, NYNEX says it plans to file federal tariffs as well as state tariffs whenever warranted.[59]

b. Discussion

34. NYNEX is correct that the Commission approved a Pactel CEI plan for VMS that involved similar circumstances.[60] The parties have not offered any arguments in this proceeding that distinguish the Plan, for purposes of CEI tariffing practices, from Pactel's VMS plan.

35. We note that the Commission's *BOC ONA Order* approves the provision of intrastate ONA services on the basis of state tariffs, but it also requires the BOCs to establish federally tariffed BSAs and BSEs.[61] Because the Commission's existing Part 69 access rules must be modified to implement the BSE unbundling requirement, the Commission has announced its intention to initiate a separate Rule Making to amend Part 69.[62] Until Part 69 is amended, the BOCs may implement their CEI plans by filing CEI service tariffs at the state level. BOCs will not be required to file interstate tariffs for such services during this interim period, although BOCs who desire to file interstate BSE tariffs may seek appropriate waivers of Part 69 rules to do so.[63] We approve this aspect of the Plan. We note however, that NYNEX will be required to file additional federal tariffs when the Commission completes the relevant Part 69 Rule Making.

C. Other Nonstructural Safeguards

1. Customer Proprietary Network Information

36. The *Phase II Order* established CPNI requirements that require BOCs to (1) make CPNI available, upon customer request, to unaffiliated enhanced service vendors on the same terms and conditions that are available to their own enhanced services personnel; (2) preclude enhanced services personnel from accessing a customer's CPNI, if the customer so requests; and (3) notify multiline business customers annually of their CPNI rights. The Commission also required the BOCs to provide to unaffiliated enhanced service vendors on the same terms and conditions, any nonproprietary, aggregate CPNI that the BOCs provide to their own enhanced service personnel.[64]

37. The *Phase II Reconsideration* required the BOCs to amend their ONA plans to describe the types of information BOCs will treat as CPNI and imposed several specific requirements.

(a) Positions of the Parties

38. NYNEX states that its compliance with the Commission's CPNI requirements is described in its ONA plan.[65] ATSI states that NYNEX's proposed treatment of CPNI appears generally consistent with the Commission's requirements.[66]

(b) Discussion

39. We approve this part of NYNEX's plan subject to two conditions. First, NYNEX must comply with the CPNI requirements of the *BOC ONA Order* when those requirements become effective.[67] Second, in the interim period before the *BOC ONA Order* becomes effective, NYNEX must file with the Commission a statement formally committing itself not to use CPNI to identify particular customers of existing VMS competitors for "targeted" marketing efforts before offering its VMS service to the public.[68]

D. Other Issues

1. Billing

40. NYNEX states that because of industry interest, it is evaluating whether it is technically, financially, and administratively feasible to bill charges for multiple voice messaging providers as part of the regular subscriber bill.[69] Based on its analysis, NYNEX says it will determine whether to offer this service to other voice messaging providers.

a. Positions of the Parties

41. ADAPSO states that NYNEX fails to provide assurance that NYNEX's provision of VMS on an unseparated basis will not result in unlawful discrimination or an

improper use restriction.[70] Nondiscriminatory access to billing services is essential, it says, to preserve competition in the face of BOC entry into the enhanced service marketplace. According to ADAPSO, NYNEX proposes to use a billing system that is an extension of its local exchange bottleneck that was created at the expense, and for the benefit, of basic service ratepayers.[71] ADAPSO urges us to clarify the nondiscrimination obligations of the BOCs with respect to the provision of billing services and require NYNEX to provide billing service to unaffiliated enhanced service providers on an unbundled and nondiscriminatory basis pursuant to the same rates, terms, and conditions that such service is made available to NYNEX's own enhanced service operations.[72]

42. ADAPSO says it is not unaware that the Commission has detariffed the interstate billing and collection services that the BOCs currently provide to interexchange carriers.[73] However, ADAPSO maintains that the mere fact that billing and collection services are no longer subject to rate regulation does not mean that we are powerless to prevent the BOCs from abusing the infrastructure supporting their regulated service offerings.[74] As long as any service is dependent on a BOC's local and interstate access distribution monopoly, says ADAPSO, we have the right and duty to ensure that access to that service is provided on a nondiscriminatory basis. ANPA agrees with ADAPSO, and adds that we should not ignore the anticompetitive impact of the use of telephone company billing by a BOC for its own VMS when the BOC denies such a crucial service to other VMS providers.[75]

43. ATSI also urges us to recognize that joint billing and collection of telephone service and affiliated VMS confers a tremendous advantage on the BOC's own enhanced services.[76] Like ADAPSO, ATSI claims that this advantage arises not from any efficiency on the part of the BOCs' enhanced service operation, but from its monopoly telephone operations. Accordingly, it believes that we should require NYNEX, if it provides billing and collection services to its affiliated VMS, to provide such services on the same terms and conditions to all providers of VMS.[77] OMNI says that it is concerned that NYNEX will offer billing services only as part of a bundled "package" of monopoly services.[78] OMNI states that NYNEX should be required to "spell out" how it intends its billing functions to be interrelated to the tariffs that nominally constitute its plan.

44. MCI says that NYNEX has no choice other than to offer nondiscriminatory billing services at cost-based rates. According to MCI, although billing is not a tariffed service, it is an integral part of any realistic CEI offering, and refusal to provide it on equal terms to all VMS providers would violate the Commission's express directive that the BOCs "open their networks to multiple competitors."[79]

45. Telenet states that any approval of NYNEX's plan should be conditioned upon NYNEX offering billing service to non-affiliated ESPs on the same terms and conditions that any such service is offered to NYNEX's own enhanced service affiliates.[80] According to Telenet, NYNEX is improperly attempting to reserve the right to offer billing to other VMS providers while offering it to its own VMS. This is patently discriminatory, it says, and should be rejected.[81]

46. Finally, Tymnet says that NYNEX has inexplicably ignored the Commission's CEI requirements in its proposal for the provision of billing services for VMS.[82] Tymnet asserts that the Commission should not approve NYNEX's plan until it fulfills these requirements. It says that the fact that billing is now detariffed at the federal level does not mean that a BOC is free to deny such service to its competitors while providing it to its own affiliate. Echoing Telenet, Tymnet dismisses NYNEX's claim that it needs to evaluate technical, financial, and administrative feasibility before deciding whether to offer the service to other voice messaging providers. Tymnet says that NYNEX, like all of the other BOCs, has been aware, since the beginning of the ONA process over two years ago, that there is substantial demand from ESPs for BOC-provided billing services.

47. In reply, NYNEX clarifies its position that billing and collection is an ancillary service that, while not required under ONA or CEI, may be useful to ESPs. NYNEX says that it will continue to entertain requests for billing and collection to ESPs and emphasizes that provision of billing and collection would be on a nondiscriminatory basis.[83] Moreover, it says that the costs of billing and collection for NYNEX's VMS will be allocated pursuant to the *Joint Cost* rules to guard against any possibility of cross-subsidy.[84]

48. NYNEX asserts that neither CEI or ONA requirements include the provision of billing and collection. Therefore, it argues, there is no support for Telenet's position that approval of this CEI plan should be conditioned upon NYNEX offering billing services to non-affiliated ESPs on nondiscriminatory terms. NYNEX notes that the Commission decision to detariff interstate billing services performed by local exchange carriers was based on a finding that significant competition exists and will continue to develop in the billing and collection arena.[85]

49. NYNEX dismisses the contention that it may garner a marketing advantage from the use of billing and collection for its VMS.[86] This contention, it says, provides no basis for disapproving or modifying its VMS plan and is outside the scope of a CEI plan review. NYNEX concludes that its billing and collection position, as clarified, is reasonable and responsive to the industry.

50. Bell Atlantic contends that there is no basis for parties' assertions that NYNEX has an obligation under the Communications Act or Commission regulations or policies to provide nondiscriminatory billing for competitors to NYNEX's proposed VMS.[87] Bell Atlantic says that the Commission has already found that for interstate communications, "billing and collection services provided by local exchange carriers are not subject to regulation under Title II of the Act."[88] It also contends that there is no legal basis for the Commission to assert ancillary jurisdiction over functions incidental to activities that the Commission has declared to be free from regulation.

(b) Discussion

51. The Commission addressed the question of BOC provision of billing and collection for ESPs in the *BOC ONA Order* and decided not to mandate that the BOCs offer these services on a regulated basis or otherwise subject to the ONA requirements.[89] The CEI requirements are not broader than the ONA requirements. Even those parties that urge NYNEX to clarify its position on this issue recognize that the Commission has deregulated these competitive services.

52. However, we do require NYNEX to clarify by February 15, 1989, how it will offer billing and collection services in connection with VMS. Moreover, the *BOC ONA Order* requires NYNEX to clarify its ONA plan by May 19, 1989, by describing any service that it would offer that would provide ESPs with information that is useful for bill preparation such as the calling number, billing address, or duration of a call. For example, if NYNEX could provide the underlying information that ESPs need to prepare their own bills as a basic service, it should so clarify.[90]

V. ORDERING CLAUSES

53. IT IS HEREBY ORDERED that, pursuant to Sections 1, 4(i) and (j), 201, 202, 203, 205, and 218 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201, 202, 203, 205, and 218, and 5 U.S.C. §553, and Sections 0.91 (h) and 0.291, the Comparably Efficient Interconnection Plan for the Provision of Voice Messaging Services of NYNEX IS APPROVED, subject to the conditions described herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 104 FCC 2d 958 (1986)(*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987)(*Phase I Reconsideration Order*), *aff'd on further reconsideration*, 3 FCC Rcd 1135 (1988)(*Phase I Further Reconsideration*), *further reconsideration pending, appeals pending sub nom. California v. FCC*, No. 87-7230 (9th Cir.)(pet. for rev. filed May 28, 1987) and *sub nom. Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also* Report and Order, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (1988)(*Phase II Reconsideration*), *further reconsideration pending, appeals pending sub nom. BellSouth Corp. v. FCC*, No. 87-7290 (9th Cir.)(pet. for rev. filed April 20, 1988), *California v. FCC*, No. 88-7183 (9th Cir.)(pet. for rev. filed May 13, 1988) and *Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.)(pet. for rev. filed May 16, 1988). *See also* Filing and Review of ONA Plans, *Memorandum Opinion and Order*, FCC 88-381 (released Dec. 22, 1988)(*BOC ONA Order*).

[2] Plan at 3.

[3] A list of commenters appears in Appendix A. We use the abbreviations in that Appendix throughout this order.

[4] Unless we take action to the contrary within 14 days after the latest date on which NYNEX submits the informational amendments required in paras. 11 and 52, *infra*, the amended plan shall be deemed approved. In addition, if NYNEX desires to offer VMS or CEI for VMS under any conditions other than those approved in this order, it must either amend its plan or file a new one.

[5] *Phase I Order*, 104 FCC 2d at 1020. A BOC also must satisfy the cost allocation requirements of our *Joint Cost Order*, which established compliance filing requirements that are separate from the CEI requirements. *See* Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, 2 FCC Rcd 1298 (1987)(*Joint Cost Order*), *modified on recon.*, 2 FCC Rcd 6283 (1987)(*Joint Cost Recon Order*), *petitions for further recon pending*.

[6] Plan at 5.

[7] *Id.* at 4. The subscriber may save or delete the contents of the stored message.

[8] *Id.* at 4-5. By contrast, in the telephone answering service, the caller intends to reach the recipient or called party directly, but is forwarded to the VMS.

[9] Telephone answering also requires some form of call forwarding.

[10] MessagePhone says that NYNEX's inclusion of the subscriber-reactive services, "call answering" and "voice mail," under the term "voice messaging services" will cause public confusion. It further claims that this labeling will prejudice another service, previously termed "voice messaging" that does not exhibit the "true" enhanced service characteristics of NYNEX's proposed service and which may not be subject to any CEI requirements. MessagePhone Comments at 2. We do not address MessagePhone's argument because it appears that MessagePhone is potentially raising a trademark issue that does not come within our jurisdictional purview. *See* 15 U.S.C. § 1051 (1982). The name that any BOC attaches to a particular service offering does not affect our substantive review of the service under *Computer III* rules.

[11] *See Pacific Bell And Nevada Bell Plan for the Provision of Voice Mail Service*, 3 FCC Rcd 1095 (1988)(*Pacific Order.*)

[12] Plan at 2.

[13] MCI expresses concern that an order on this CEI plan will prejudge the resolution of issues raised in this plan that are also raised in the ONA context. *See* MCI Comments at 4-9. In addition, MCI argues that we should not remove the structural separation requirements for any BOC enhanced service until ONA plans have been approved and implemented. *Id.* We note that the recently adopted *BOC ONA* order has already resolved many of the issues raised by NYNEX's CEI plan. Furthermore, in that order the Commission explicitly recognized that CEI plans could be filed pending final action on the BOC ONA plans and provided instructions to the Bureau for reviewing the CEI plans. *See BOC ONA Order* at 94, para. 184 and n. 364. Thus, the removal of structural separation for NYNEX's proposed VMS is fully justified based on NYNEX's compliance with the Commission's CEI rules.

[14] Plan at 6.

[15] *Id.*

[16] *Id.* at 8.

[17] *Id.* at 8 n. 6. NYNEX says that this service will operate in accordance with the characteristics specified in Bellcore technical reference TR-TSY-000283 and technical advisory TA-TSY-000034.

[18] *Phase I Order*, 104 FCC 2d at 1039-1043, paras. 154-166.

[19] We find the plan adequately satisfies the other five CEI parameters: resale; technical characteristics; installation, maintenance, and repair; and recipients of CEI.

[20] *Phase I Order*, 104 FCC 2d at 1041, para. 161.

[21] ANPA Comments at 4.

[22] *Id.* at 4-5. OMNI Comments at 4-9, 21-22. OMNI says that NYNEX has not provided detailed descriptions of all elements of the proposed CEI interface, and that until it offers additional details, NYNEX's plan is not complete. OMNI says that if NYNEX's Trunk Side Access permits interconnection at a tan-

dem switch rather than an end office, then the practicality of the call answering/voice mail CEI arrangement for a non-collocated ESP is improved. However, Pacific says that OMNI is incorrect in implying that there is a CEI requirement to provide interoffice capability for basic service elements (BSEs).

[23] OMNI Comments at 21.

[24] We do not agree with OMNI's claim that NYNEX's proposed SMDI is unreasonably restricted, since any disadvantage associated with NYNEX's technical arrangement for this service will be equally borne by all ESPs, including NYNEX's own enhanced operations. All that NYNEX is required to provide under CEI is equal treatment to all ESPs.

[25] *Phase I Order*, 104 FCC 2d at 1040, para. 158.

[26] Plan at 8-9.

[27] OMNI Comments at 21.

[28] MCI Comments at 8.

[29] NYNEX Reply at 7.

[30] *Id.*

[31] *Phase I Order*, 104 FCC 2d at 1065, para. 217.

[32] *Id.* at 1041, para. 163.

[33] Plan at 11.

[34] For example, access lines, multi-line hunt groups, and direct inward dial lines are offered under tariff now. *Id.*

[35] *Id.*

[36] ANPA Comments at 5; MCI Comments at 11-13. MCI claims that of the currently unavailable basic services that NYNEX plans to use to provide VMS -- CFBLDA, SMDI and Trunk Side Access -- Trunk Side Access is the only function for which NYNEX is willing to provide the required opportunity for testing by competitors prior to its first use as part of its own VMS.

[37] ANPA Comments at 5; ATSI Comments at 3-5; OMNI Comments at 21-22.

[38] ATSI Comments at 2.

[39] OMNI Comments at 11.

[40] ATSI Comments at 3.

[41] *Id.* at 5 *quoting* Plan at 11.

[42] ATSI Comments at 4.

[43] *See Phase I Order*, 104 FCC 2d at 1041, para. 163.

[44] *Phase II Reconsideration*, 3 FCC Rcd at 1155, para. 34.

[45] Plan at 12-13. NYNEX says that should either its VMS operations or a competitor locate within a wire center district and avoid the need for interoffice mileage, each would pay only for access to the central office. Moreover, NYNEX says that should its VMS operations be located within the central office, it will be charged for access lines as though the operations were located outside the central office building, and within the wire center district. Finally, NYNEX says that should either its VMS operations or a competitor, for economic or other reasons, locate outside a wire center district, each would be charged the same tariffed interoffice mileage rates.

[46] MCI Comments at 13.

[47] OMNI Comments at 22.

[48] NYNEX Reply at 9. NYNEX says that even when its VMS equipment is located within a NYNEX central office building, that equipment will be charged for access lines as though the operations were located outside the central office building, and within the wire center district. Access line charges to NYNEX's VMS will be the same as those to any other ESP within the same wire center district or area.

[49] *Id.* at 9, *citing* MCI Comments at 13 n. 21.

[50] NYNEX Reply at 9. NYNEX states that the Commission's holding in the *Pacific Order* on this parameter applies equally to the NYNEX plan.

[51] *See* Plan at Attachment B.

[52] ATSI Comments at 6.

[53] OMNI Comments at 17. OMNI says that NYNEX could be planning to impose regular local call charges upon the end user whose calls were forwarded to the competing ESP only (with no similar charges applied for calls forwarded to its own collocated VMS equipment), or it could plan to impose such charges on all forwarded calls, both to customers of a NYNEX VMS service as well as to customers of a competing VMS offering. *Id.* at 17-20. OMNI says that either alternative would result in "excessive charges and discriminatory treatment for ESPs and their customers." *Id.* at 18.

[54] *Phase I Order*, 104 FCC 2d at 1055, para. 190. *See also Phase I Reconsideration*, 2 FCC Rcd at 3067 n. 218; *Southwestern Bell Telephone Company Plan for the Provision of Voice Messaging Services*, DA 88-1469 (released September 29, 1988) (*Southwestern Order*).

[55] ATSI Comments at 5-6.

[56] AT&T Comments at 2.

[57] *Id.* at 2. AT&T explains that this is because in order to transport information associated with BSEs as part of basic, end-to-end interexchange services, IXCs must obtain interstate access services, *i.e.*, "services and facilities provided for the origination or termination of any interstate or foreign telecommunication." These access services, it says, can only be provided through interstate access tariffs.

[58] MCI Comments at 11, *quoting* NYNEX ONA Plan, Supplemental Reply (July 22, 1988 at 5). MCI notes that Attachment A to NYNEX's CEI plan refers to the basic service components of its VMS as "Local Exchange Carrier and Interexchange Carrier Service Components," thus conceding, it argues, that the network features, services and capabilities that are the subject of NYNEX's CEI plan can be used in the origination and termination of interstate enhanced services. MCI Comments at 10.

[59] NYNEX Reply at 11 n. 18.

[60] *See* Plan at 2; *see also Pacific Order*.

[61] *See BOC ONA Order* at 142-143, 160-162, paras. 278-279, 309-312.

[62] *Id.* at 144-145, paras. 281-282.

[63] NYNEX, of course, files federal access tariffs now, and any ESP, including any VMS provider, may purchase services from such tariffs for use in their interstate enhanced offerings. *See* First Data Resources, Inc., *Memorandum Opinion and Order*, Mimeo No. 4732, released May 28, 1986. We do not mean to suggest that NYNEX, or any exchange carrier, can restrict the ability of ESPs to obtain access services from existing federal tariffs.

[64] *Phase II Order*, 2 FCC Rcd at 3093-98.

[65] *See* Appendix L of NYNEX's ONA Plan. *See also* NYNEX ONA reply comments at 89; NYNEX ONA Amendment (March 10, 1989). NYNEX says that in notifying multi-line business customers of their CPNI rights, NYNEX will utilize the notification letter/response form submitted with its ONA reply comments. NYNEX says that non-proprietary aggregated CPNI, will be made available to the enhanced services industry on the same terms and conditions as the CPNI is available to NYNEX personnel engaged in the marketing of enhanced services. Plan at 14-15.

[66] However, ATSI argues that the Commission's CPNI rules are fundamentally flawed and that the rules sanction conduct is blatantly anticompetitive. ATSI Comments at 2 n. 1. Telenet

says that the Commission's CPNI policies disserve the public interest and are inconsistent with the Modification of Final Judgement (MFJ). Telenet Comment at 2 n. 1. As ATSI implicitly recognizes, this CEI proceeding is not the proper forum for reexamining the Commission's CPNI rules. Furthermore, we do not assess NYNEX's compliance with the Commission's CEI and other nonstructural requirements on the basis of parties' arguments that it complies or does not comply with the MFJ. The restrictions imposed by the MFJ court are independent of those which the Commission has imposed on the BOCs.

[67] That order discusses in detail the kinds of information that the BOCs should treat as CPNI, and the treatment of certain CPNI that a BOC could use to identify customers of competing ESPs. The BOC ONA *Order* also contains a detailed discussion of the procedures that the carriers should follow to safeguard access to their CPNI, including the use of password identification systems, and it clarifies the procedures that the BOCs should follow in releasing aggregate CPNI to competing ESPs.

[68] We note that we conditioned our approval of Southwestern Bell Telephone Company's CEI plan for VMS on a similar commitment by Southwestern. *Southwestern Order* at para. 37.

[69] Plan at 17.

[70] ADAPSO Comments at 2-3, 9-10. ADAPSO claims that if NYNEX offers billing and collection under tariff, it may not limit the availability of such tariffed service to its own enhanced service operations without violating the Commission's proscription against use restriction in the BOCs' CEI and ONA tariffs. ADAPSO also says that it is unclear how the charges for VMS will appear on a customer's bill. Specifically, ADAPSO says that NYNEX does not indicate whether these charges will be bundled with the customer's basic service charges or separately identified as charges for a competitive unregulated offering. It is also unclear, it says, whether NYNEX will provide billing service to NYNEX's enhanced service operations pursuant to new or existing intrastate billing and collection tariffs, some form of contractual arrangement, or an internal cost accounting system.

[71] *See also* OMNI Comments at 12.

[72] ADAPSO Comments at 7 and 9. *See Phase I Order*, 104 FCC 2d at 1040, para. 158.

[73] ADAPSO Comments at 6.

[74] *Id.* at 7. ADAPSO says that historically, the Commission has not hesitated to ensure that carriers provide reasonable nondiscriminatory access to their facilities, such as pole attachments, even when such access was not itself subject to tariff regulation. *See Continental Cablevision of New Hampshire*, 48 FCC 2d 89, 90 (1974). In addition, ADAPSO and OMNI claim that the MFJ also provides the Commission with a basis for requiring NYNEX to provide nondiscriminatory billing services to unaffiliated enhanced service providers. Even without the MFJ, ADAPSO says that the U.S. Court of Appeals for the District of Columbia Circuit has recently held that the BOCs' nondiscrimination obligations are extremely broad, offering still another alternative basis for requiring nondiscriminatory provision of these services. *Id.* at 10-11, *citing United States v. Western Electric Co.*, No. 87-5063, *slip op. at 13-14 (D.C. Cir. May 10, 1988)*. *See also* ANPA Comments at 6.

[75] ANPA Comments at 6.

[76] ATSI Comments at 9.

[77] *Id.*

[78] OMNI Comments at 13-17. For example, OMNI states that NYNEX has recently proposed a tariff in which customers would be permitted to take a particular transport service (Interactive Information Network Services or IINS) without taking the associated billing, processing, and recording functions, but not the reverse. OMNI claims NYNEX will not offer billing to its customers unless the customers also adopt the IINS transport service and the network architecture that this particular transport arrangement implies. According to OMNI, this amounts to an effective tie-in of NYNEX's billing service monopoly with its highest-priced transport serving arrangement.

[79] MCI Comments at 15.

[80] Telenet Comments at 4.

[81] *Id.* at 3. Telenet adds that NYNEX should not need more time to study the "billing situation" since provision of these services for ESPs was repeatedly identified as a high priority need by various segments of the ESP industry over the last eighteen months.

[82] Tymnet Comments at 5-6, *quoting Phase I Order*, 104 FCC 2d at 1040.

[83] NYNEX Reply at 11-12. NYNEX says that its plans with respect to billing and collection are identical to those of Pacific in its approved CEI Plan.

[84] *Id.* at 12. NYNEX says that under those rules, to the extent that billing and collection is offered under tariff, NYNEX VMS would take billing and collection at the same tariff rates available to non-affiliates. NYNEX also says that, contrary to the assertions of ADAPSO and OMNI, the MFJ does not require NYNEX to provide billing and collection to ESPs. This, it says, is clearly not the forum to litigate what the MFJ may or may not require.

[85] *Id.* at 13.

[86] *Id.*

[87] Bell Atlantic Reply at 3.

[88] *Detariffing of Billing and Collection Services*, 102 FCC 2d at 1169.

[89] *See BOC ONA Order* at 58, para. 109.

[90] For reasons we have repeatedly stated, we do not address the applicability of any MFJ court restrictions relating to billing and collection. *See supra*, n. 65; *see also Pacific Order*, 3 FCC Rcd at 1103, para. 75; *Southwestern Order* at para. 38.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

RCA GLOBAL COMMUNICATIONS, INC. File No. I-T-C-88-175

Application for authority under Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in a digital submarine cable system between and among Hong Kong, Japan and Korea.

US SPRINT COMMUNICATIONS COMPANY File No. I-T-C-88-210

Application for authority under Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in a digital submarine cable system between and among Hong Kong, Japan and Korea.

GTE HAWAIIAN TELEPHONE COMPANY, INC. File No. I-T-C-89-008

Application for authority under Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in a digital submarine cable system between and among Hong Kong, Japan and Korea.

WU WORLD COMMUNICATIONS, INC. File No. I-T-C-89-009

Application for authority under Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in a digital submarine cable system between and among Hong Kong, Japan and Korea.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: December 23, 1988; Released: January 12, 1989

By the Chief, International Facilities Division:

1. MCI International, Inc. (MCII) on behalf of its wholly-owned affiliate, RCA Global Communications, Inc. (RCA Globcom), US Sprint Communications Company (US Sprint), GTE Hawaiian Telephone Company, Inc. (GTE Hawaiian Tel) and WU World Communications, Inc. (Worldcom) have filed applications with the Commission requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to: 1) acquire and operate capacity in the Hong Kong-Japan-Korea cable system (H-J-K cable system); and 2) acquire by lease such connecting facilities necessary to extend the capacity to be acquired in the H-J-K cable system to Hong Kong and Korea. We placed RCA Globcom's application on public notice August 10, 1988, US Sprint's application on public notice September 30, 1988, and the applications of GTE Hawaiian Tel and Worldcom on public notice October 26, 1988. No comments were received.

2. The proposed H-J-K cable system is expected to be in service sometime in May, 1990. When completed, the system will extend between landing points at the existing station at Deep Water Bay, Hong Kong; the existing cable station at Chikura, Japan; and a new cable station to be constructed at Cheju, Korea. The H-J-K cable system will be connected with the respective domestic networks in Hong Kong, Japan and Korea. Suitable connecting facilities will extend the cable to the borders of other countries, including the United States, and to the cable and earth station terminals of other international communications systems.

3. The H-J-K cable system is divided into four segments. Segment A consists of the cable station at Deep Water Bay, Hong Kong. Segment C consists of the cable station at Chikura, Japan. Segment D consists of the cable station to be constructed at Cheju, Korea. Segment B consists of two working optical fiber pairs: one between Chikura, Japan and Cheju, Korea and one between Chikura, Japan and Deep Water Bay, Hong Kong; including the associated nominal 140 Mbit/s digital input/output ports at the Segment A, Segment C and Segment D cable systems. Segment B, in turn, is comprised of three subsegments: Subsegment B1, that part of Segment B between the branching unit located between the three landing points and the associated nominal 140 Mbit/s digital input/output ports at Deep Water Bay, Hong Kong (inclusive), Subsegment B2, that part of Segment B between the branching unit, including said branching unit, and the associated nominal 140 Mbit/s digital input/output ports at Chikura, Japan (inclusive), and Subsegment B3, that part of Segment B between the branching unit and the associated nominal 140 Mbit/s digital input/output ports at Cheju, Korea (inclusive). The maximum capacity of this system is provided in four 140 Mbit/s streams, two in each optical fiber pair. Each 140 Mbit/s stream contains 1890 Minimum Assignable Units of Ownership (MAUOs).[1] For voice telephone requirements, digital circuit multiplication systems (DCMS) can be applied to derive five voice paths from each MAUO. The estimated capital cost of the H-J-K cable system is approximately $ 185.4 million.

4. In its application, RCA Globcom seeks authority to acquire and activate up to 12 half-MAUOs in the H-J-K cable; three half-MAUOs in the Japan-Korea fiber pair and nine half-MAUOs in the Japan-Hong Kong fiber pair. In addition, it requests permission to acquire by lease the connecting facilities necessary to extend its capacity to Hong Kong and Korea. RCA Globcom currently employs a mix of satellite and submarine cable capacity to service these points. RCA Globcom will bear .18073 percent, or approximately $335,000, of the estimated total capital cost of the system.

5. US Sprint seeks authority to activate up to 30 half MAUOs in the Japan-Hong Kong fiber pair. It also requests permission to acquire by lease the connecting facilities necessary to extend its capacity to points in Hong Kong and Japan. US Sprint proposes to furnish its regularly authorized services using the requested facilities in accordance with its tariffs on file, or to be filed, with the Commission. At present, US Sprint utilizes satellite capacity acquired from Communications Satellite Corporation (Comsat) to reach these points. US Sprint will bear .50681 percent, or approximately $940,000, of the estimated total system cost.

6. GTE Hawaiian Tel requests authority to acquire and activate up to 20 half-MAUOs in the H-J-K cable; eight half-MAUOs in the Japan-Hong Kong fiber pair and 12 half-MAUOs in the Japan-Korea fiber pair. It also seeks authority to acquire by lease the connecting facilities necessary to extend its capacity to points in Hong Kong and Korea. It intends to utilize its capacity in the H-J-K cable to furnish its regularly authorized services to these locations. At present, GTE Hawaiian Tel services these points through a mix of undersea cable and satellite capacity. GTE Hawaiian Tel will bear .24989 percent, or approximately $ 463,000, of the estimated total system cost.

7. Worldcom seeks authority to acquire and activate up to 35 half-MAUOs in the H-J-K cable system.[2] Of those MAUOs activated, five half-MAUOs will be in the Japan-Korea fiber pair and 30 half-MAUOs will be in the Japan-Korea fiber pair. Worldcom also requests authority to acquire by lease the connecting facilities necessary to extend its services to Hong Kong and Korea. At present, it uses satellite capacity and a variety of cable facilities to service these points. Worldcom will bear.55462 percent, or approximately $1.03 million, of the estimated total system cost.

DISCUSSION

8. The issues concerning the need for and timing of facilities in the Pacific Ocean Region (POR) during the 1987-1995 period have been considered exhaustively in Phase II of the comprehensive planning process. In the Phase II *Report and Order*, the Commission concluded that the public interest would be served by the introduction of a fiber optic cable in the POR as early as 1988.[3] The Commission expressed a preference for the ring configuration described in Plan II-A (Mod. 4). Under Plan II-A (Mod. 4), the cable system will extend from the U.S. mainland to Hawaii, (HAW-4/TPC-3 cable system to be introduced in 1988), continue via a branching unit to Guam and the Philippines (Guam-Philippines (GP-2) cable to be introduced in 1989) and then extend from the Philippines linking Hong Kong, Korea and Japan in 1990 or later. The Commission found that the ring design would allow the cable to be self-restoring, in whole or in part, west of the branching unit.[4] For example, this configuration provides the Department of Defense (DoD) with alternative routing arrangements for connecting Guam with other locations in the Far East.[5] With a ring configuration, the loss of any one segment will not totally disrupt communications beyond that point.

9. The Commission has already approved the acquisition and operation of capacity by AT&T,[6] MCII and TRT Telecommunications Corporation[7] in the H-J-K cable system. In granting AT&T's application, the Common Carrier Bureau (Bureau) determined that authorization of AT&T's participation in the H-J-K cable is consistent with the objectives underlying the Commission's conclusions in the *Report and Order*. The Bureau found that the extension of lightwave technology within the POR will promote intermodal and intramodal competition, technological development and customer choice, and will create incentives for more efficient operations. Consequently, we conclude that grant of the applications filed by RCA Globcom, US Sprint, GTE Hawaiian Tel and Worldcom will be in the public interest.

10. Accordingly, IT IS ORDERED that application File No. I-T-C-88-175 IS GRANTED, and RCA Globcom is authorized to:

1) acquire and operate a one-half interest in nine MAUOs in the Japan-Hong Kong fiber pair of the H-J-K cable system;

2) acquire and operate a one-half interest in three MAUOs in the Japan-Korea fiber pair; and

3) acquire by lease such connecting facilities as may be needed to extend its capacity in the H-J-K cable system to points in Hong Kong and Korea.

11. IT IS FURTHER ORDERED that application File No. I-T-C-88-210 IS GRANTED, and US Sprint is authorized to:

1) acquire and operate a one-half interest in 30 MAUOs in the Japan-Hong Kong fiber pair of the H-J-K cable system; and

2) acquire by lease such connecting facilities as may be needed to extend its capacity in the H-J-K cable system to Hong Kong.

12. IT IS FURTHER ORDERED that application File No. I-T-C-89-008 IS GRANTED, and GTE Hawaiian Tel is authorized to:

1) acquire and operate a one-half interest in eight MAUOs in the Japan-Hong Kong fiber pair of the H-J-K cable system;

2) acquire and operate a one-half interest in 12 MAUOs in the Japan-Korea fiber pair; and

3) acquire by lease such connecting facilities as may be needed to extend its capacity in the H-J-K cable system to points in Hong Kong and Korea.

13. IT IS FURTHER ORDERED that application File No. I-T-C-89-009 IS GRANTED, and Worldcom is authorized to:

1) acquire and operate a one-half interest in 30 MAUOs in the Japan-Hong Kong fiber pair of the H-J-K cable system;

2) acquire and operate a one-half interest in five MAUOs in the Japan-Korea fiber pair; and

3) acquire by lease such connecting facilities as may be needed to extend its capacity in the H-J-K cable system to points in Hong Kong and Korea.

14. IT IS FURTHER ORDERED, that the Commission retains jurisdiction to reallocate the interests of RCA Globcom, US Sprint, GTE Hawaiian Tel and Worldcom in capacity authorized herein, as the public interest may require to accommodate additional carriers or otherwise, with, when required, the concurrence of the foreign administration or carriers concerned, and further, jurisdiction is retained by the Commission over all matters relating to ownership, management, maintenance and operation of cable systems as authorized herein, to assure the most efficient use not only of these cable systems but of all means of communication between the U.S. and the POR.

15. IT IS FURTHER ORDERED, that the Commission retains the jurisdiction to review the DCMS, multiplexing and interworking arrangements and attribution of costs thereof and to require such changes in the provision of these services and equipment as may be necessary.

16. IT IS FURTHER ORDERED, that RCA Globcom, US Sprint, GTE Hawaiian Tel and Worldcom shall not dispose of any authorized interest or capacity in the H-J-K cable system without prior authorization by the Commission.

17. IT IS FURTHER ORDERED, that RCA Globcom, US Sprint, GTE Hawaiian Tel and Worldcom shall include the H-J-K cable system in its monthly Circuit Status Reports filed pursuant to the Commission's Orders. These reports shall be filed no later than the 20th day of each month providing the information for the preceding month.

18. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division

FOOTNOTES

[1] A MAUO is defined in the H-J-K Construction and Maintenance Agreement (C&MA) as a unit of ownership designated as the minimum, practical unit of ownership, consisting of 73,684.656 bits per second. A MAUO consists of 64,000 usable bits per second and an additional 9,684.656 bits per second required for multiplexing purposes.

[2] Worldcom was not a party to the original C&MA. On October 19, 1988, it signed the H-J-K Cable C&MA Amendatory Agreement No. 1, thereby becoming an owner of the system.

[3] Pacific Planning, 102 FCC 2d 353, 355 (1985).

[4] *Id at 366.*

[5] *See* DOD comments in Pacific Telecom Cable, Inc., File No. I-S-C-L-86-002, Mimeo No. 2984 (released Apr. 22, 1987).

[6] American Telephone & Telegraph Co., 3 FCC Rcd 3605 (1988).

[7] MCI International, Inc., *et.* al., 3 FCC Rcd 4346 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
the Application of

COMSAT EARTH STATIONS, INC. — CSG-88-065-AL

Application for Consent to
Assignment of Radio Station License

U.S. ELECTRODYNAMICS, INC. — I-T-C-88-161

For Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Establish Channels of Communication for the Provision of Common Carrier Service between the U.S. and Japan

U.S. ELECTRODYNAMICS, INC. — I-T-C-89-003

For Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Establish Additional Channels of Communication for the Provision of Common Carrier Television Service between the U.S. and Australia, Korea, New Zealand and Philippines via the 180 Degree Intelsat System

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 23, 1988; Released: January 12, 1989

By the Chief, International Facilities Division:

1. On July 7, 1988, Comsat Earth Stations, Inc. (CESI) filed an application requesting authority to transfer and assign its radio station license of the Brewster, Washington earth station (KA-20) to U.S. Electrodynamics, Inc. (USEI). On July 7, 1988 and October 11, 1988 USEI filed applications requesting authority to provide common carrier television services between its earth station in Brewster, Washington and Australia, Japan, Korea, New Zealand and the Philippines.[1] CESI's application was placed on public notice July 20, 1988. The USEI applications were placed on public notice on July 20, 1988 and October 26, 1988, respectively. No comments were received. We grant the applications for the reasons set forth below.

2. USEI states that it is the owner of the physical facilities of the Brewster earth station to which license KA-20 was previously assigned. USEI explains that it purchased the Brewster facilities in 1987 from the U.S. Earth Station Ownership Consortium (ESOC).[2] ESOC consisted of American Telephone and Telegraph, Western Union International, Inc., RCA Global Communications, Inc. and Communications Satellite Corporation (Comsat), with Comsat functioning as both a co-owner and operating entity/trustee.

3. Although USEI states it did not purchase the facilities for telecommunications purposes, it notes that the facilities have remained intact and have been recently used to fulfill television communications needs by U.S. carriers to and from Australia, Japan, Korea, New Zealand and the Philippines under a grant of Special Temporary Authority.[3] USEI adds that the current request for reactivation of the Brewster earth station facilities has arisen because MCI has asked USEI, on behalf of its end user Armed Forces Radio and Television Service (AFRTS), to provide 36 MHz full-period contract service to Australia, Korea, New Zealand and the Philippines and occasional use radio and video services on the INTELSAT Pacific Ocean Region (POR) satellite located at 180 degrees East Longitude. According to USEI, the primary end user of its facilities is AFRTS, which transmits programming to U.S. military personnel and dependents stationed around the world.

4. USEI also states that its request is for ground segment only since the international facilities are currently in place. According to USEI, the additional cost of providing the domestic feeder receive service is minimal and has already been thoroughly tested with end-to-end technical sufficiences to be accepted by the customer, overseas users, Comsat and INTELSAT (via standard SSOG testing procedures). USEI states that ground segment service will be provided in accordance with a tariff to be filed shortly.

5. Upon review of the applications, we find USEI's plan to provide communications services is an operationally sound approach for meeting the needs of its client, MCI, and the AFRTS network. The proposed reactivation will not adversely affect the environment and the antenna will comply with all applicable rules.

6. We therefore conclude that CESI's assignment of its license to USEI will be in the public interest. The assignment is merely the completion of the transaction involving USEI's purchase of the assets of the Brewster earth station. We also conclude that USEI's provision of common carrier television services between its earth station in Brewster, Washington and Australia, Japan, Korea, New Zealand and the Philippines will be in the public interest. This will allow USEI to meet the specific customer request of MCI which will, in turn, provide service to the AFRTS network.

7. Accordingly, IT IS ORDERED that the application of Comsat Earth Stations, Inc. File No. CSG-88-065-AL IS GRANTED to permit the assignment of its international fixed radio station license for the Brewster, Washington facility to USEI.

8. IT IS FURTHER ORDERED that the applications File Nos. I-T-C-88-161 and I-T-C-89-003 ARE GRANTED and USEI is authorized to establish channels of communication for the provision of common carrier service between the U.S. and Japan, Australia, Korea, New Zealand, and the Philippines via the Brewster, Washington earth station facilities.

9. IT IS FURTHER ORDERED that Special Temporary Authority (ITC-89-003-T-1) granted to USEI on October 19, 1988, is HEREBY TERMINATED.

10. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

11. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

12. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] The applications were filed under Section 214 of the Communications Act of 1934, as amended, 47 U.S.C 214.

[2] Because USEI did not intend to enter into the communications business when it purchased the assets of the Brewster facility, the radio station license was not transferred with the earth station assets.

[3] Special Temporary Authority (ITC-89-003-T-1) granted on October 19, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
the Application of

ALPHA LYRACOM, d/b/a Pan American Satellite — CSG-89-001-P/L

For Authority to Construct and Operate an 11/14-GHz International Earth Station at Homestead, Florida, Communicating with the Pan American Satellite Separate International Satellite System

ALPHA LYRACOM, d/b/a Pan American Satellite — CSG-89-002-P/L

For Authority to Construct and Operate a 4/6 GHz International Earth Station at Homestead, Florida, Communicating with the Pan American Satellite Separate International Satellite System

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: December 23, 1988; Released: January 12, 1989

By the Chief, International Facilities Division:

1. On October 4 and October 17, 1988 Alpha Lyracom, d/b/a/ Pan American Satellite (PAS) filed the above-captioned applications requesting authority to construct and operate an 11/14 GHz fixed-satellite earth station and a 4/6 GHz fixed-satellite earth station at Homestead, Florida communicating with PAS-1 satellite located at 45 degrees West Longitude, respectively.[1] The applications were placed on public notice October 12 and 26, 1988, respectively. No comments were received. We grant the applications for the reasons set forth below.

2. The proposed earth stations at Homestead, Florida will consist of a 9.1-meter antenna operating in 14.0-14.5 GHz transmitting frequency band and 11.7-11.95 GHz receiving frequency band and an 11.1-meter antenna operating in 5925-6425 MHz transmitting frequency band and 3700-4200 MHz receiving frequency band. PAS states that these earth stations will serve as "gateways" providing access to PAS' separate international satellite system. It states that the services to be provided will include transmission and reception of analog video and associated audio signals, as well as digital data services. Such services will be provided on a non-common carrier basis to customers throughout the United States and abroad.

3. PAS has the legal, technical and financial qualifications to construct and operate the proposed earth stations. Frequency coordination in accordance with Section 25.203 of the Commissions rules has been completed. However, international frequency coordination for the C-band earth station in accordance with Article 11 of the International Telecommunication Union (ITU) Radio Regulations has not been completed.

4. On September 30, 1987, the Commission authorized PAS to begin operation of its five 4/6 GHz transponders for communications between the United States and Peru consistent with INTELSAT Article XIV(d) consultations completed in April 1987.[2] On October 28, 1988, the Commission authorized PAS to operate five 4/6 GHz transponders on the PAS-1 satellite to provide communications capacity between the United States and the Dominican Republic and Costa Rica, and to operate six 11/14 GHz transponders on the PAS-1 satellite to provide communications capacity between the United States and the United Kingdom, Ireland, the Federal Republic of Germany, Sweden and Luxembourg consistent with the INTELSAT Article XIV(d) consultations completed in April 1987 and October 1988. [3] The facilities that are the subject of this application will function as an essential element in PAS' overall satellite system.

5. Upon review of the applications, we find PAS' request to construct the 11/14 GHz Ku-band and 4/6 GHz C-band fixed-satellite earth stations at Homestead, Florida and to operate with PAS-1 satellite will serve the public interest, convenience and necessity.

6. Accordingly, IT IS ORDERED that the applications of PAS, File Nos. CSG-89-001-P/L and CSG-89-002-P/L ARE GRANTED pursuant to Sections 304, 308, 309 and 319 of the Communications Act of 1934, as amended, 47 U.S.C. 304, 308, 309 and 319 and PAS is authorized to construct and operate "gateway" earth stations at Homestead, Florida, operating with the PAS-1 satellite. Before the completion of equipment installation and facility activation, however, the applicant shall provide the Commission with a summary of equipment which was actually installed.

7. IT IS FURTHER ORDERED that the operation of PAS' proposed earth stations is restricted to the provision of capacity through the sale or long-term lease of transponder capacity for communications not interconnected with the public-switched message networks (except for emergency restoration service).

8. IT IS FURTHER ORDERED that the authority granted herein is specifically conditioned on the operation of the proposed earth stations in accordance with the parameters summarized and conditions described in Attachment No. 1 to AP-11-10E, "Report by the Board of Governors to the Eleventh Assembly of Parties Pursuant to Article XIV(d) on the PanAmSat Network" (February 1987).

9. IT IS FURTHER ORDERED that operation of the proposed earth stations is limited to communications to or from the United States and those points specified in paragraph 4 and those additional points that may be authorized in the future to the PAS-1 satellite upon notice from the Department of State that the United States has fulfilled its obligations to consult with INTELSAT under Article XIV(d).

10. IT IS FURTHER ORDERED that the Commission will retain jurisdiction over the use of all space segment within the PAS system and operation of the proposed earth stations to ensure compliance with the restrictions stated.

11. IT IS FURTHER ORDERED that PAS' earth station authorization is subject to coordination with other administrations in accordance with Article 11 of the ITU Radio Regulations.

12. IT IS FURTHER ORDERED that Special Temporary Authorities (CSG-89-001-P/L-T-1 and CSG-89-002-P/L-T-1) granted to PAS on October 21, 1988, are HEREBY TERMINATED.

13. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] The applications were filed purusuant to Sections 304, 308, 309 and 319 of the Communications Act of 1934, as amended, 47 U.S.C. 304, 308, 309 and 319.

[2] Pan American Satellite, 2 FCC Rcd 7011 (1987).

[3] Pan American Satellite Corporation, DA-88-1720 (released November 7, 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
the Application of

COMMUNICATIONS SATELLITE CORPORATION — I-T-C-88-207

For Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Establish Channels of Communication between an Earth Station at United Nations Headquarters in New York and Overseas Points

COMMUNICATIONS SATELLITE CORPORATION — CSG-88-090-P/L

For Authority to Act as Licensee of an Eleven Meter INTELSAT Standard G Earth Station at the United Nations Plaza in New York

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: December 23, 1988; Released: January 12, 1989

By the Chief, International Facilities Division:

1. On September 21, 1988, Communications Satellite Corporation (Comsat) filed the above-captioned applications requesting authority to act as licensee of an eleven-meter international earth station meeting the INTELSAT Standard G technical parameters at the United Nations (U.N.) Plaza in New York and to provide common carrier services between the U.N headquarters and various overseas points in support of the peacekeeping and humanitarian objectives of the United Nations.[1] These applications were placed on public notice September 28, 1988. No comments were received. We grant the applications for the reasons set forth below.

2. Comsat states that the United Nations has constructed an eleven-meter INTELSAT Standard G earth station at its Headquarters Building in New York as part of its U.N. International Communications Satellite System. According to Comsat, communications will initially be established between New York and Jerusalem, Israel and Naqoura, Lebanon. At the request of the U.N., and after discussions with the U.S. Department of State, Comsat indicates it has agreed to act as the licensee for the New York station. This station was scheduled to begin INTELSAT verification tests on September 21, 1988 and to begin operations on September 23, 1988.[2] Comsat adds that it has also agreed to charge the U.N. only for the costs of any FCC filing fees incurred in connection with this activity.

3. Comsat also states that the New York earth station, with all necessary baseband and radio frequency equipment, will provide voice, data and facsimile communications between New York and the overseas stations in the U.N network. The earth station will be used to further the peacekeeping, emergency relief activities, U.N. personnel security and related activities of the United Nations, particularly in regard to U.N. activities involving the Iran-Iraq ceasefire, the situation in Namibia, and Afghanistan/Pakistan affairs, Comsat adds. According to Comsat, the unique status of the U.N. under international law will allow INTELSAT space segment to be provided to the United Nations pursuant to an August 1984 Agreement between the U.N. and INTELSAT. Comsat explains that pursuant to this Agreement, the United Nations was allocated the use of a quarter transponder lease of 9 MHz bandwidth on INTELSAT satellites on a basis which reflects the U.N.'s unique mission and international humanitarian communications requirements. [3]

4. Comsat further states that the new earth station at the U.N. Plaza will be capable of operating throughout the 3700 to 4200 MHz receive band and 5925 to 6425 MHz transmit band presently allocated to communications satellite service. Based on a frequency coordination study, Comsat states it has been demonstrated that no potentially harmful interference will be caused to any lawfully operated radio station as a result of the operation of the New York earth Station.

5. In its application, Comsat requests a waiver of the Commission's *Earth Station Ownership* Report and Order[4] to the extent such a waiver is necessary, to permit it to act as a licensee for the U.N. earth station. Comsat maintains a separate subsidiary is not required to stand as licensee because the *Earth Station Ownership* Order, at most, requires the separation of Comsat's competitive earth station activities from its space segment activities. Comsat explains that since it has agreed to charge the U.N. only for the costs of any FCC filing fees incurred and the U.N. will obtain space segment directly from INTELSAT pursuant to the August 1984 Agreement between the U.N. and INTELSAT, the separation is not at issue.

6. Upon review of the applications, we find the operation of the proposed facility will provide vital U.N. communications links with Jerusalem and Naqoura and greatly facilitate the operation of the U.N.'s peacekeeping, emergency relief activities, U.N. personnel security and related activities, consistent with the public interest, convenience and necessity. The earth station has already been constructed by the United Nations and the applicant will bear no part of the cost of this construction. Further, existing facilities are inadequate to provide the U.N. a dedicated facility on its premises as it wishes. We note that Comsat filed a tariff revision under Transmittal No. 708, issued October 3, 1988 to provide for service at no charge to the United Nations. Finally, the proposed operation of the earth station will not adversely affect the environment and the antenna will comply with all applicable rules.

7. We therefore conclude that it will be in the public interest to waive the requirements of the *Earth Station Ownership* Report and Order under these special circumstances in order to authorize Comsat to be the licensee of an eleven-meter international earth station meeting the INTELSAT Standard G technical parameters at the U.N. Plaza in New York in support of the peacekeeping and humanitarian objectives of the United

Nations. Although the earth station facilities will be maintained and operated by U.N. personnel, Comsat is solely responsible as licensee for complying with the Commission's Rules and Regulations under the Communications Act of 1934, as amended and the Communications Satellite Act of 1962.

8. Accordingly, IT IS ORDERED that applications, File Nos. CSG-88-090-P/L and I-T-C-88-207 ARE GRANTED pursuant to Sections 214, 304, 306, 309 and 319 of the Communications Act of 1934, as amended, 47 U.S.C. 214, 304, 306, 309 and 319 and Sections 201(c)(4), 201(c)(6) and 201(c)(7) of the Communications Satellite Act of 1962, and Comsat is authorized to: (a) operate an elevenmeter INTELSAT Standard G international earth station at United Nations Headquarters in New York; and (b) establish channels of communication between the earth station at United Nations Headquarters in New York and Israel and Lebanon, and the additional international points that may be authorized in Comsat's tariff in support of the United Nation's unique mission and international humanitarian communications requirements.

9. IT IS FURTHER ORDERED that Special Temporary Authority (CSG-88-090-P/L-T-1) granted to Comsat on September 21, 1988, is HEREBY TERMINATED.

10. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] The applications were filed pursuant to Sections 214, 304, 308, 309 and 319 of the Communictions Act of 1934, as amended, and sections 201(c)(4), 201(c)(6) and 201(c)(7) of the Communications Satellite Act of 1962.

[2] Comsat requested and received Special Temporary Authority (CSG-88-090-P/L-T-1) on September 21, 1988.

[3] Three U.N.-owned and operated earth stations located in Geneva, Jerusalem and Naqoura are currently operating pursuant to this Agreement.

[4] *Modification of Policy on Ownership* and *Operation of U.S. Earth Stations that Operate with the INTELSAT System*, 100 FCC 2d 250 (1974).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-89-019

Application for authority to acquire and operate satellite facilities for service to the Caribbean area, Central America, South America and Africa.

ORDER AND AUTHORIZATION

Adopted: December 29, 1988; Released: January 12, 1989

By the Chief, International Facilities Division:

1. The above-captioned application, filed on October 31, 1988 by American Telephone and Telegraph Company (AT&T), requests authority for the continuation of blanket authority expiring on December 31, 1988 to acquire and operate satellite circuits for service to points in the Caribbean area, Central America, South America and Africa until December 31, 1989.[1] AT&T also seeks to incorporate into its blanket authorization the circuits granted in the Commission's Order, Authorization and Certificate released November 11, 1988 (DA 88-1773 File No. I-T-C-88-214) for service to Aruba. AT&T states that it will need no additional circuits during 1989. The application was placed on public notice on November 2, 1988. No comments were received. Upon consideration of the application, we find that authorization of the requested service and facilities is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that File No. I-T-C-89-019 IS GRANTED, and AT&T is authorized to:

a. lease from Comsat and operate 6,860 voice-grade satellite circuits listed in the Appendix hereto between an appropriate earth station on the east coast of North America and an appropriate satellite over the Atlantic Ocean;

b. lease and operate necessary overseas transiting facilities listed in the Appendix; and

c. use said facilities to provide AT&T's regularly authorized services between the U.S. and the points listed in the Appendix and beyond for the year 1989.

3. All other terms and conditions of the Commission's blanket authorization, cited in paragraph 1 above, remain the same.

4. The Commission's order authorizing service to Aruba cited in paragraph 1 above, is hereby superseded.

5. AT&T shall file a new application for satellite circuits beyond 1989 to the Caribbean area, Central America, South America and Africa on or before November 1, 1989.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] *See* Commission's Orders released on December 31, 1985 (Mimeo No. 1687, File No. I-T-C-86-019), March 24, 1986 (Mimeo No. 3322, File No. I-T-C- 86-061), October 17, 1988 (DA 88-1563 File No. I-T-C-88-182, 3 FCC Rcd 6061 (1988)).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US WEST, INC.

Offer of Comparably Efficient
Interconnection to Providers
of Voice Messaging Services

MEMORANDUM OPINION AND ORDER

Adopted: December 28, 1988; Released: January 13, 1989

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On May 13, 1988, pursuant to the requirements of the Commission's *Computer III* proceeding,[1] US West, Inc. (US West) filed a Comparably Efficient Interconnection (CEI) Plan (the Plan) for Voice Messaging Services (VMS). US West describes its proposed VMS offering as a type of enhanced service that allows users to leave, direct, and retrieve voice messages using equipment collocated with US West's basic service facilities.[2] We invited public comment on the Plan. Six parties filed comments, and US West filed a reply. [3] In this order, we approve the Plan, but require US West to file (1) annual affidavits attesting to compliance with nondiscrimination procedures; (2) quarterly reports on the installation and maintenance of CEI services; (3) a commitment to refrain from identifying particular customers of existing VMS competitors for "targeted" marketing efforts; and (4) informational amendments on its billing and collection procedures.[4]

II. BACKGROUND

2. Approval of a CEI plan permits a Bell Operating Company (BOC) to offer a specific enhanced service, or class of services, on an unseparated basis before its comprehensive Open Network Architecture (ONA) plan is implemented. The Commission has established certain specific CEI requirements, as well as other nonstructural safeguards governing the use of customer proprietary network information (CPNI), disclosure of network information, and nondiscrimination reporting.[5]

III. SERVICE DESCRIPTION

A. *The Plan*

3. US West's proposed service will allow subscribers, using touchtone phones, to record messages for later retrieval by, or delivery to, one or more individuals designated by the sender. VMS customers will have various features available to them, including storage, retrieval, redirect, group broadcast, future delivery, reply, skip back or ahead, message scan, and pause features, depending on the VMS equipment available at the time of deployment. US West will assign personal identification numbers (PIN) to customers for security purposes. Its service will also use PINs in identifying the recipients of individual-specific messages. US West will use equipment separate and distinct from equipment utilized to provide basic network services to provide all deregulated VMS enhanced features and functions.[6]

4. US West's proposed VMS has four applications. The first, telephone answering, provides automated telephone answering for a subscriber whose line is busy, who does not answer within a prescribed number of rings, or whose line has been forwarded to the voice messaging equipment. After a caller records a message, a stutter dial tone, message waiting lamp, or a call back at a predesignated number will notify the VMS subscriber of a waiting message. A subscriber may retrieve messages from any touchtone phone.

5. The second application, voice mail, provides subscribers with 24-hour-a-day telephone answering plus additional features. This service also provides (1) the ability for the caller to prioritize message delivery (*i.e.*, standard, urgent and private); (2) the ability for the subscriber to send the same message to a predesignated group of recipients by making one call; and (3) a caller help feature that gives prompts and options or transfers a caller to an alternative answering position, if necessary.

6. The third application, call delivery, allows a subscriber to record a message for delivery to a third party. If the called number is busy or is not answered, the VMS equipment will make repeated completion attempts. A subscriber who has recorded a message can call the VMS equipment to determine if the message was successfully delivered.

7. Finally, the message storage application allows a subscriber to store a message for later retrieval by others. The subscriber who stores a message can leave either general or individual-specific messages -- that is, the stored message can be available to all persons who call the VMS equipment, or a message can be restricted to those who have a PIN. Any touchtone phone can be used by a caller for retrieving messages.[7]

8. US West states generally that its VMS enhanced service will use equipment that is separate and distinct from equipment used to provide basic network services. It says it has adopted a "virtual collocation policy."[8] US West's enhanced service operations will access the basic network through tariffed services of the same type and at the same rates available to providers of the same or materially similar enhanced services -- as though US West's enhanced service operation were located on separate premises from its regulated activities.[9] US West adds that its Plan is "in all material respects identical" to the Pacific Bell and Nevada Bell VMS CEI plan that the Commission approved.[10]

B. *Positions of the Parties*

9. ANPA states that the Plan fails to indicate whether VMS "features of special attraction" will be available equally to competing enhanced services providers when such features are "part of or derived from monopoly provision of basic service." ANPA argues that this omission "disserves the public interest" by only providing a partial picture of how US West's offering of such services is likely to affect the development of a competitive enhanced services marketplace. ANPA also seeks clarifica-

tion of how US West will assign voice messaging "addresses" or PINs. ANPA is apparently asking whether US West will give some VMS customers priority over others in assigning addresses or PINs.[11]

10. US West replies that ANPA's concerns are unclear. It reiterates that all the basic network services that US West's VMS will use are listed as unbundled basic services in the Plan.[12]

C. *Discussion*

11. ANPA appears to be asking us to regulate the provision of US West's enhanced services, rather than identifying any concern ANPA has with US West's underlying basic services. Both the availability of VMS "features of special attraction" and the nature and assignment of voice messaging "addresses" or PINs appear to be aspects of US West's proposed VMS offering, rather than its underlying basic services, which are subject to regulation. ANPA's request is thus beyond the scope of our CEI review.

IV. COMPLIANCE ISSUES

A. *CEI Requirements*

1. *Proposed CEI Arrangements*

12. US West states that four existing access arrangements underlie its VMS offering: local business exchange service, foreign exchange service, 800 service and 3002 series private line service. Its VMS will also use seven basic services that US West proposes as BSEs under its ONA plan: Message Delivery Service; Message Waiting Indication; Hunting; Call Forwarding Busy Line; Call Forwarding Variable; Call Forwarding/Don't Answer; and Call Forwarding Busy Line/Don't Answer.[13] Four of these BSEs are currently available only as part of US West's Centrex/Centron offering: message delivery service, message waiting indication, call forwarding busy line and call forwarding busy line/no answer. One other service, call forwarding/don't answer, is available on an unbundled basis only in Washington and Oregon.[14] US West states, however, that all BSEs used in its VMS service will be available for general purchase on an unbundled basis in any jurisdiction when US West initiates VMS in that jurisdiction. It adds that it will implement those BSEs in other jurisdictions in response to ESP needs, consistent with its use of the "BSE evaluation criteria" in the US West ONA plan.

2. *CEI Parameters*

13. The *Phase I Order* lists nine CEI parameters.[15] Commenters question US West's compliance with six of them: unbundling of basic services; technical characteristics; installation, maintenance, and repair; CEI availability; minimization of transport costs; and recipients of CEI.[16]

a. *Unbundling of Basic Services*

14. To satisfy the CEI requirements, the BOC basic services and basic service functions that underlie a BOC's enhanced service offering must be unbundled from its other basic service offerings and associated with a specific rate element in the CEI tariff.[17]

(1) *Positions of the Parties*

15. ANPA objects to US West's proposed use of market demand as a factor in deciding whether to unbundle certain basic services.[18] US West replies that the Commission's CEI parameters do not prohibit reliance on market demand as a basis for unbundling, so long as the basic services to be used by the BOC's enhanced service are unbundled and made available where that BOC will use them.[19] US West adds that it uses market demand as a basis for expanding basic service availability beyond the requirements of its own enhanced service operations, and thus goes beyond CEI requirements toward fulfillment of the goals of ONA.[20]

(2) *Discussion*

16. ANPA's comments on the "market demand" criterion for BSEs are not relevant to our evaluation of this CEI plan. US West states that it will provide the same basic services that its proposed enhanced service will use, at the same time and in the same areas. For CEI purposes, no further unbundling is necessary. We thus find that US West has adequately satisfied this CEI requirement.

b. *Technical Characteristics*

17. The *Phase I Order* requires that a BOC's CEI offering to enhanced service competitors must include basic services with technical characteristics that are equal to those of the basic services it utilizes for its own enhanced services. These characteristics include, but are not limited to: transmission parameters, such as bandwidth and bit rates; quality, such as bit error rate and delay distortions; and reliability, such as mean time between failures.[21]

(1) *Positions of the Parties*

18. The Plan states that US West will use existing standard network interfaces to interconnect to its VMS service. It emphasizes that the facilities provided to US West and its competitors will be free of user-perceived qualitative differences and systematic differences in measured quality.[22] US West adds that it will file annual affidavits attesting that proper procedures have been followed and that no discrimination has in fact occurred.[23] However, ANPA faults the Plan for not providing a method for verifying that no discrimination has in fact occurred.[24]

(2) *Discussion*

19. We are satisfied that under the Plan, US West will provide basic services to its enhanced service competitors equal in terms of technical characteristics to those it uses for its own enhanced services. We find that the procedures that US West describes in its ONA plan provide substantial assurance that it cannot discriminate in the technical characteristics of its basic CEI offerings. Accordingly, the Plan adequately complies with this CEI parameter.

c. *Installation, Maintenance, and Repair*

20. The time periods for installation, maintenance, and repair of the basic services and facilities included in a CEI offering must be the same as those the BOC provides to its own enhanced service operations.[25]

(1) *Positions of the Parties*

21. ANPA argues that the Plan should indicate whether a distinction exists between maintenance activities and repair activities and, if so, what factors determine service priorities, including those subject to human intervention. ANPA adds that US West must clarify its proposed procedures for monitoring and detecting discriminatory conduct.[26] US West responds that its proposed procedures, established in its amended ONA Plan, sufficiently meet the nondiscrimination requirements and that its report or affidavit will provide assurance of detection of any discriminatory conduct that might occur.[27]

(2) *Discussion*

22. We discuss US West's nondiscrimination reports in paras. 59-62 below. Otherwise, the Plan adequately satisfies this requirement. We have already determined that a carrier need not distinguish between maintenance and repair in the CEI context.[28]

d. *CEIAvailability*

23. A BOC's CEI offering must be fully operational when the BOC offers its corresponding enhanced service to the public. In addition, the BOC must provide an opportunity for enhanced service competitors to use CEI facilities and services for testing purposes before the BOC makes its enhanced service public offering.[29]

(1) *Positions of the Parties*

24. The Plan states that the necessary basic access arrangements are currently available in all US West jurisdictions. It adds that the CEI services currently only available in bundled form, *i.e.*, message delivery service, message waiting indication, call forwarding or busy line, and call forwarding or busy line or no answer, will be generally available in any jurisdiction where US West uses these basic services, no later than the date US West uses them for provision of VMS.[30]

25. ATSI states that US West neither provides a description of the areas in which it will offer its unseparated enhanced services, nor does it specify the network locations in which it will provide CEI.[31] ATSI adds that the failure to specify central office locations for CEI availability makes anticompetitive deployment decisions more difficult to detect.[32]

26. US West replies that it will offer unbundled basic services in the following jurisdictions at the outset: Colorado, Idaho, Iowa, Oregon, Utah, and Washington. US West adds that, although it will not be offering its enhanced VMS in all of these states, competitive ESPs will be able to obtain the underlying basic services in each.[33] US West has filed with us samples of the state tariff and catalog pages unbundling those basic services from current Centrex/Centron tariffs in those jurisdictions.[34] In addition, US West states that it has recently distributed to interested ESPs and other parties a list of the central offices equipped with the relevant underlying basic services at the time tariffs were filed.[35] US West adds that it will publish updated lists of additional central offices that support such services as they are added. US West will only use services from central offices that have been so identified and made available for use by all ESPs.[36]

27. MCI states that the Plan fails to ensure that competitors have the opportunity required by *Computer III* to test their offerings prior to the date that US West's enhanced offering becomes available.[37] US West responds that it will make testing capability available to competitors at the same time that such capability is available to its own operations. US West asserts that this will assure that competitors may perform the testing necessary to ensure reasonable opportunity for resolution of technical problems on terms and conditions as for US West's enhanced service operations.[38]

(2) *Discussion*

28. We find that US West has satisfied this CEI parameter. US West's description of its recent tariff and catalog filings and the list of central offices equipped with basic CEI services responds sufficiently to ATSI's concern that US West did not specify the network locations in which it will provide CEI.[39] IF US West should decide to limit the CEI deployment described in its reply, US West must amend the Plan. Finally, we find that US West has adequately responded to MCI's concern about testing opportunities, and we approve this aspect of its Plan as clarified in the US West reply.

e. *Minimization of Transmission Costs*

29. The *Phase I Order* recognized that telephone companies could offer enhanced services more efficiently by collocating or integrating enhanced services facilities with their basic network facilities. While the Commission did not require the BOCs to permit ESPs to collocate equipment on BOC premises, the Commission did require the BOCs to minimize transmission costs for noncollocated ESPs. The *Phase I Reconsideration* clarified that while the requirement that transmission costs be minimized focuses on technological methods rather than pricing, a CEI offering that is substantially identical to existing services need not be priced lower than those services simply for CEI purposes.[40] The *Phase II Reconsideration* clarified that a BOC may satisfy this CEI requirement if it charges itself an access link rate that is the same as that paid by non-collocated ESPs, provided that the access connections in each case are equivalent in technical quality.[41]

(1) *Positions of the Parties*

30. The Plan states that US West's enhanced service operation will be charged the same rates as unaffiliated ESPs for all underlying basic services.[42] US West's ONA plan states that when the appropriate access arrangement includes distance-sensitive pricing, US West's collocated services would be treated as within the lowest mileage band. The ONA plan stated that the first mileage band for switched access includes distances up to one mile.[43]

31. Telenet asserts that US West proposes to minimize transmission costs by providing virtual collocation within a mileage band of one mile.[44] It argues that a review of Telenet's locations indicates that a two- to three-mile band would be more appropriate for minimizing transmission costs for the majority of data ESPs. Telenet suggests that virtual collocation within a serving central office area might be an easier alternative to implement.[45] US West replies that the reference to a "one mile virtual collocation band" in its ONA plan was merely an illustrative example of the numerous access alternatives available to customers under existing tariffs.[46] US West adds that the basic services described in the Plan are not priced on a distance-sensitive basis within a serving central office area.[47]

(2) *Discussion*

32. For CEI purposes, US West has complied with this parameter. The Plan states that US West will charge itself the same rates for access as it charges to all other competing ESPs, and that no access service that is to be used for CEI is priced on a distance-sensitive basis. Telenet's criticism of the US West ONA plan is not relevant to this CEI plan. Accordingly, we approve this aspect of US West's Plan.

f. *Recipients of CEI*

33. BOCs may not restrict the availability of federally tariffed CEI services to any particular class of customers or ESPs.[48] If state tariffs include customer or use restrictions, BOCs must provide in their CEI plans an explanation of, and justification for, any such restrictions.[49]

(1) *Positions of the Parties*

34. The Plan states that all of the basic services used by US West's VMS operations are or will be available to all users for any lawful purpose.[50]

35. ANPA argues that while the Plan provides that ESPs may purchase call forwarding/busy line for ESP customers that authorize the ESP to do so, the Plan fails to state that this option applies to other features as well.[51] US West responds that it will not preclude any properly authorized enhanced service vendor from purchasing the unbundled BSEs listed in the Plan on behalf of a customer.[52] US West states that this authorization requirement will apply to its own enhanced operation as well as to other ESPs.[53]

(2) *Discussion*

36. We conclude that the Plan adequately provides for nondiscriminatory access to CEI to any class of customer or enhanced service provider. US West's reply adequately responds to ANPA's concerns.

B. *CEI Pricing*

37. The *Phase I Order* established CEI pricing standards for the interconnection, concentration, and transmission aspects of CEI services. The Commission requires averaging of interconnection and certain concentration costs, and permits, but do not require, transmission charges to be distance-sensitive rather than averaged.[54]

1. *Rate Information*

a. *Positions of the Parties*

38. The Plan states that US West's VMS operations will obtain all underlying basic services except detariffed services at tariffed rates. US West says it will provide nondiscriminatory price lists, which will be published at reasonable times prior to implementation of the basic service in question.[55] US West also submits copies of tariff and catalog pages filed in relevant state jurisdictions to unbundle those basic services currently bundled in Centrex/Centron services.[56]

39. MCI and ANPA object to the absence of information in the Plan on the rates for BSEs that US West has not yet unbundled.[57] MCI is concerned that US West's proposal to make certain unbundled BSEs available only when it initiates its own VMS offering in a jurisdiction, or when such elements become generally available under ONA, fails to indicate how such elements will be priced when the BSEs are unbundled and provides no basis for determining whether such rates meet CEI pricing guidelines. ANPA reiterates concerns expressed in its ONA comments.[58]

b. *Discussion*

40. We find that US West has satisfied the CEI pricing requirements based on our examination of the tariff and catalog pages it submitted subsequent to the filing of its Plan.[59] We treat these pages as amendments to the Plan.

2. *Federal Tariffing*

a. *Positions of the Parties*

41. Several parties contend that US West should tariff its CEI services at the federal level as well as with the states. MCI states that US West's general intent to implement CEI and ONA only through intrastate tariffs violates fundamental jurisdictional principles. MCI adds that US West's intent to price BSEs pursuant to state pricing and costing rules, thus ignoring federal pricing rules, makes its failure to provide access through interstate tariffs unreasonable and unlawful.[60] Telenet states that it is likely that some VMS usage will be interstate. It adds that the use of federal tariffs is particularly important for a CEI plan such as US West's because US West has indicated a preference for state tariffs that are not cost-based and some states have detariffed or are expected to detariff some basic services.[61] ATSI reiterates its position that, to ensure that BOC pricing and tariffing do not negate the value of new offerings, the Commission should make approval of ONA plans contingent on the filing of federal tariffs for interstate ONA services.[62] AT&T states that US West should clarify that its CEI capabilities will be available to interexchange carriers under interstate access tariffs.[63]

42. US West states that the CEI requirements do not mandate federal tariffing. US West adds that it will provide competing VMS providers with basic services that are equivalent to those its own enhanced service operations will use. US West states that because its enhanced service operations are only intrastate, it will be using basic services offered from state tariffs or price lists. US West therefore contends that it does not need to file interstate tariffs. However, it commits to adhere to the principles of its ONA plan for both state-tariffed and price-listed basic services to ensure nondiscrimination in these offerings.[64] US West notes that the Commission approved Pactel's VMS plan, which also proposed only intrastate tariffs.[65] According to US West, that order stated that filing of intrastate tariffs does not foreclose ESPs from obtaining interstate access to unbundled basic services through existing interstate access arrangements.[66]

b. *Discussion*

43. The basic CEI services that US West proposes in the Plan are either presently tariffed, cataloged at the state level, or filed in the states. US West is correct that the Commission has approved a Pactel CEI plan for VMS in similar circumstances.[67] The parties have not offered any arguments in this proceeding that distinguish the Plan, for purposes of CEI tariffing practices, from Pactel's VMS plan.

44. We note that the Commission's *BOC ONA Order* approves the provision of intrastate ONA services on the basis of state tariffs, but it also requires the BOCs to establish federally tariffed BSAs and BSEs. [68] Because the Commission's existing Part 69 access rules must be modified to implement the BSE unbundling requirement, the Commission has announced its intention to initiate a separate Rule Making to amend Part 69.[69] Until Part 69 is amended, the BOCs may implement their CEI plans by filing CEI service tariffs at the state level. BOCs will not be required to file interstate tariffs for such services during this interim period, although BOCs who desire to file interstate BSE tariffs may seek appropriate waivers of Part 69 rules to do so.[70] We approve this aspect of the Plan. We note however, that US West will be required to file additional federal tariffs when the Commission completes the relevant Part 69 Rule Making.

C. *Other Nonstructural Safeguards*

1. *Use of Customer Proprietary Network Information*

45. The *Phase II Order* established CPNI requirements that require BOCs to: (1) make CPNI available, upon customer request, to unaffiliated ESPs on the same terms and conditions that are available to their own enhanced services personnel; (2) limit their enhanced services personnel from accessing a customer's CPNI, if the customer so requests; and (3) notify multiline business customers annually of their CPNI rights. The Commission also required the BOCs to provide to unaffiliated enhanced service vendors on the same terms and conditions, any nonproprietary, aggregate CPNI that the BOCs provide to their own enhanced services personnel.[71]

a. *Access to Restricted CPNI*

(1) *Positions of the Parties* [72]

46. The Plan cross-references US West's amended ONA plan for details on US West's compliance with the Commission's CPNI requirements. [73] US West's ONA plan proposes two security approaches to protect "customer-specific" CPNI -- one restricting access by US West enhanced services employees, and the other restricting use of the "network-only" accounts.[74]

47. ANPA states that the Plan is unclear as to how US West will protect CPNI from unauthorized use, adding that it would be insufficient for US West to allow employees to access restricted CPNI but merely prohibit them from using it. ATSI argues that use of a password is necessary to protect restricted CPNI.[75] ANPA also states that US West does not describe how it will monitor employees to prevent abuse of CPNI.[76]

48. US West responds that it has modified its methods for restricting access to CPNI.[77] It will not use a "restricted use" approach, but will instead use two interim access restriction methods until it fully implements software-based password identification security systems. [78] However, US West emphasizes in its ONA reply comments that the Commission has not required a software-based password security approach as the only acceptible method for restricting access.[79]

(2) *Discussion*

49. We agree with the commenters who contend that a password/ID system is the preferred method for protecting restricted CPNI. US West appears to propose its access restriction methods as interim measures for use until software-based password security measures are implemented. We therefore find that the Plan satisfies this CPNI requirement on an interim basis until US West implements CPNI access restrictions for enhanced services generally, as specified in the *BOC ONA Order*. [80]

b. *CPNI Definition*

(1) *Positions of the Parties*

50. The Plan cross-references the US West ONA plan which defines customer-specific CPNI as private customer data related to the customer's basic network services accumulated by the carrier in the course of furnishing common carrier services. Examples provided include "customer record information," service order information, repair information, traffic studies, and station message detail recording information.[81]

51. ATSI objects to the inclusion of "traffic studies" in CPNI. ATSI says making such information available to BOC enhanced service personnel creates competitive risks. It asserts that a BOC could use such information to identify existing customers of VMS providers and lure them away. ATSI argues that US West has conceded that traffic studies are not part of the customer's electronic databases, thereby confirming that such studies should not be considered part of CPNI.[82] US West does not respond to this argument in its reply.

(2) *Discussion*

52. For purposes of interim CEI implementation, we find that US West's general definition of CPNI satisfies our standards. Contrary to ATSI's assertions, CPNI, as customer-specific information about use of a BOC's regulated network, would include BOC studies of customers' traffic over their networks. Such traffic studies would be subject to the CPNI rules, and we therefore approve this portion of the Plan.

c. *Customer to Which CPNI is Attributed*

(1) *Positions of the Parties*

53. The US West ONA plan states that the billed party will control CPNI treatment for private lines, and each call forwarding customer will retain control over the information contained in its account records. US West cross-references that statement in the Plan.[83]

54. ATSI objects to US West's attribution of CPNI to the party that it bills for the corresponding basic service. ATSI says this procedure makes the forwarded-to number in call forwarding CPNI of the end user, as opposed to the VMS provider. ATSI argues that US West has conceded that at least technically the end user could be identified as a customer of the VMS provider. ATSI adds that it would be relatively easy for US West to map forwarded-to numbers against the numbers of competing VMS vendors. ATSI also disputes US West's assertion that it is necessary for the forwarded-to number to appear on the customer record for purposes of installation, maintenance, and customer service. ATSI states that the for-

warded-to number could remain on the customer service record, but be expunged from the record provided to enhanced services personnel.[84] The US West reply incorporates by reference the CPNI procedures discussed in its ONA reply comments.[85] US West states that the competitive concerns voiced regarding US West's inclusion of the call forwarded-to number are overstated. First, US West argues that its enhanced services personnel would not necessarily have knowledge of how a network service is to be used by a customer, or even if it is to be used with an enhanced service. Second, US West states that a Commission requirement forcing US West to restrict a portion of the customer record at the request of the enhanced service provider would inhibit US West's day-to-day business of offering telecommunications basic services to subscribers.[86]

(2) *Discussion*

55. We find that for purposes of interim CEI implementation, US West's Plan satisfies this CPNI requirement. The *BOC ONA Order* required the BOCs to amend their ONA plans to address concerns similar to those expressed in this proceeding by ATSI concerning the treatment of the call forwarding information of a VMS customer. During the interim period before ONA plan amendments become effective, we prohibit US West from using CPNI to identify particular customers of existing VMS competitors for "targeted" marketing efforts. We require US West to amend its CEI plan to commit itself to this course.[87]

d. *Release of CPNI to Unaffiliated ESPs*

(1) *Positions of the Parties*

56. US West states in its ONA plan that customer-specific CPNI will be made available to enhanced vendors without charge unless the amount and/or nature of such requests begin to impose a burden on the carriers, and that especially expensively created CPNI could be provided to an ESP at an appropriate negotiated price. US West adds that the same rules will apply when its enhanced services operations use such CPNI.[88]

57. ANPA states that US West's intention to negotiate an appropriate price for aggregate CPNI is inadequate to show that competitors will be given access on equal terms and conditions.[89] US West responds that it intends to charge its enhanced services operations no less than it charges any competing vendor for the same or similar CPNI.[90]

(2) *Discussion*

58. We find that US West satisfies this CPNI rule. US West's commitment to subject its enhanced service operation to the same rules and conditions fulfill the goals of equal access that underlie this CPNI requirement.

2. *Nondiscrimination Reporting*

59. The *Phase II Order* required AT&T and the BOCs to file quarterly nondiscrimination reports that provide comparative data on the timing of installation and maintenance, as well as the quality and reliability, of the basic services offered as part of any CEI tariff.[91] The *Phase II Reconsideration* eliminated the quality reporting requirement for BOCs that satisfy certain conditions. The *BOC ONA Order* permits most BOCs to file installation and maintenance reports in a simplified format, finding adequate assurances that their internal procedures will preclude discrimination in the timing of installation and maintenance of ONA and CEI services. In addition, the Commission lifted the quality reporting requirement for those BOCs that have demonstrated that they lack the ability to discriminate in the quality of their ONA/CEI services.[92]

a. *Positions of the Parties*

60. US West states that its ONA plan, as amended, demonstrates that US West cannot discriminate between its enhanced services and those offered by others.[93] US West adds that it will track promised installation dates met and maintenance time intervals for basic services provided to its VMS and for those provided to other ESPs. US West states that its quarterly reports will include: (i) the percent of installation orders for which the promised intervals were met for US West's VMS and for competing ESPs, and (ii) the average duration of reported troubles or outages for basic services used for US West's VMS and competing ESPs.[94]

61. ANPA suggests that US West's reports on installation intervals and average duration of troubles should compare the experience of competitors providing the same enhanced services as US West, and should be provided by service category. ANPA also states that US West should comply with the level of detail in trouble reports required in the *Pactel Order*.[95] US West replies that its proposed procedures and reporting and affidavit submissions meet the Commission's CEI requirements and provide assurance that discriminatory conduct will be detected and disciplined as appropriate. US West explains that Commission requirements require tracking of quality, installation, repair, and maintenance, which provides the mechanism for detection of discriminatory conduct that ANPA seeks.[96] Moreover, US West emphasizes that it cannot report by classes of ESPs. US West submitted a sample installation report with the Plan which tracks basic service categories.[97]

b. *Discussion*

62. The Commission evaluated the BOCs' nondiscrimination procedures in detail in the *BOC ONA Order*.[98] The *BOC ONA Order* permitted US West to file annual quality nondiscrimination affidavits, in lieu of reports, and accordingly such affidavits will be sufficient for CEI purposes as well.[99] The Commission also required US West to amend its ONA plan dealing with installation and maintenance procedures and reports. Once these amendments are reviewed and approved, US West should incorporate them into its CEI procedures for VMS. Until that time, we require US West to file the quarterly installation and maintenance reports proposed in its CEI Plan.[100]

D. *Other Issues*[101]

1. *Billing and Collection*

a. *Positions of the Parties*

63. ATSI notes that the Plan does not discuss billing and collection for enhanced services and the US West ONA plan states that US West's enhanced services may use its billing service in any reasonable and compensatory manner, without regard to the manner in which billing

services are provided to others.[102] ATSI claims that this gives the BOC's enhanced service operations a discriminatory advantage because it allows these operations to avoid substantial costs that competitors incur. [103] ATSI states that US West's position that billing and collection is a competitive, detariffed service is irrelevant and misleading, since the Commission detariffed billing and collection as a "third party" service that a local exchange carrier (LEC) provides to unaffiliated interexchange carriers.[104] In contrast, ATSI contends, in the CEI context a BOC provides billing and collection to its own affiliate, yielding much greater incentive and ability to discriminate than when all customers are unaffiliated, as interexchange carriers are. ATSI states that the Commission should direct US West to provide billing and collection to its own VMS operations and to competitors on equal terms.[105]

b. *Discussion*

64. US West has not yet stated what billing option it will pursue. As we have previously required for other carriers,[106] US West, as a condition of Plan approval, must file an amendment to its Plan by February 1, 1989, describing the manner in which it will provide billing for its VMS service. US West should also specify the billing arrangements, if any, that will be available to providers of competing services.[107]

V. ORDERING CLAUSES

65. IT IS HEREBY ORDERED that, pursuant to Sections 1, 4(i) and (j), 201, 202, 205, and 218 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201,202,203,205, and 218, 5 U.S.C. § 553, and Sections 0.91(h) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91(h), 0.291, the Plan to Offer Comparably Efficient Interconnection for Voice Messaging Services of US West, as amended, IS APPROVED, subject to the conditions described herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

APPENDIX A

PARTY FILING CEI PLAN

The US West Telephone Companies (US West)

PARTIES FILING COMMENTS

American Telephone Publishers Association (ANPA)

Association of Telemessaging Services International, Inc. (ATSI)

American Telephone and Telegraph Company (AT&T)

Creeley Telephone Answering Service

MCI Telecommunications Corporation (MCI)

Octel Communications Corporation (Octel)

Telenet Communications Corporation (Telenet)

PARTY FILING REPLY COMMENTS

US West

FOOTNOTES

[1] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration*), *further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration*), *second further reconsideration pending, appeals pending sub nom. California v. FCC*, No. 87-7230 (9th Cir.) (pet. for rev. filed May 28,1987) and *sub nom. Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also Report and Order*, 2 FCC Rcd 3072 (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration*), *further reconsideration pending*, (pet. for rev. filed Apr. 20, 1988), *California v. FCC*, No. 88-7183 (9th Cir.) (pet. for rev. filed May 13, 1988) and *Illinois Bell Telephone Co. v. FCC*, No. 88-1364 (D.C. Cir.) (pet. for rev. filed May 16, 1988). *See also* Filing and Review of Open Network Architecture Plans, *Memorandum Opinion and Order*, FCC 88-381 (released Dec. 22, 1988) (*BOC ONA Order*).

[2] Plan at 5.

[3] A list of commenters appears in Appendix A. We use the abbreviations in that Appendix throughout this order.

[4] If US West desires to offer VMS or CEI for VMS under any conditions other than those approved in this order, it must either amend its Plan or file a new one. US West has committed to fulfilling this obligation. Plan at 6.

[5] *Phase I Order*, 104 FCC 2d at 1020, para. 115. AT&T and the BOCs also must satisfy the cost allocation requirements of the *Joint Cost Order*, which established compliance filing requirements that are separate from the CEI requirements. *See* Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, 2 FCC Rcd 1298 (1987)(*Joint Cost Order*), *modified on reconsideration*, 2 FCC Rcd 6283 (1987) (*Joint Cost Reconsideration*), *further reconsideration*, FCC 88-355 (released Nov. 18, 1988).

[6] Plan at 5-6.

[7] *Id.* at 7-8; Ex Parte Letter from Elridge A. Stafford, Director-Federal Relations, US West, to Donna Searcy, Secretary, FCC, dated Dec. 6, 1988.

[8] Plan at 6 & n.9.

[9] *Id.* at 6 n.9, *citing* US West ONA Plan at 336-40.

[10] Plan at 1, *citing* Pacific Bell and Nevada Bell, Plan for the Provision of Voice Mail Services, *Memorandum Opinion and Order*, 3 FCC Rcd 1095 (1988) (*Pactel Order*), *further order*, 3 FCC Rcd 3552 (1988) (*May 23 Order*).

[11] ANPA Comments at 2-3. In addition, both ATSI and MCI dispute US West's assertion that its Plan is materially identical to the CEI plan that the Commission previously approved in the *Pactel Order*. ATSI claims that US West's Plan raises serious unresolved issues, such as failure to reveal service locations and discriminatory provision of billing and collection services. ATSI Comments at 3 n.3. MCI argues that US West's Plan differs from the Pactel CEI Plan for VMS by failing to indicate how currently bundled basic service elements (BSEs) will be priced when unbundled in the future, as well as failing to provide

competing enhanced service providers (ESPs) with the opportunity to test their own offerings prior to the date that US West's VMS service becomes available. MCI Comments at 10-11.

[12] Reply at 9 n. 23.

[13] Plan at 9-10.

[14] *Id.* at 3-4 & n. 8.

[15] *Phase I Order*, 104 FCC 2d at 1039-1043, paras. 154-66.

[16] We find that the Plan adequately satisfies the other CEI parameters: interface functionality; resale; and end user access.

[17] *Phase I Order*, 104 FCC 2d at 1040, para. 158.

[18] ANPA Comments at 4.

[19] US West Reply at 8-9, *citing Phase I Order*, 104 FCC 2d at 1040 n. 216.

[20] US West Plan at 8-9.

[21] *Phase I Order*, 104 FCC 2d at 1041, para. 160.

[22] Plan at 15. US West states that it describes its procedures for processing and assigning circuits in detail in its amended ONA plan. US West asserts that these procedures assure that there can be no systematic discrimination in circuit assignment based on customer or proposed use. *Id.*, *citing* US West ONA Plan at 396-400; US West ONA Plan Amendment at 1-5 (Plan, Exhibit F).

[23] Plan at 15-16 & Exhibit F.

[24] ANPA Comments at 3.

[25] *Phase I Order*, 104 FCC 2d at 1041, para. 161.

[26] ANPA Comments at 5-6.

[27] Reply at 9-10. US West also requests that it be permitted to substitute an annual affidavit for quarterly maintenance and installation reports.

[28] *See* Southwestern Bell Telephone Company, Comparably Efficient Interconnection Plan for the Provision of Voice Messaging Services, *Memorandum Opinion and Order*, DA 88-1469 (released Sept. 29, 1988) (*SWBT Order*), at para. 12.

[29] *Phase I Order*, 104 FCC 2d at 1041, para. 163.

[30] Plan at 17.

[31] ATSI Comments at 6-7.

[32] *Id.*, *citing* ATSI Comments on BellSouth's CEI Plan, filed April 25, 1988, at 11-12.

[33] Reply at 3.

[34] Ex Parte Letter from Elridge A. Stafford, Director-Federal Relations, US West, to Donna Searcy, Secretary, FCC, dated Oct. 13, 1988 (*US West Ex Parte Letter*), Attachment A.

[35] *Id.* at Attachment B.

[36] US West Reply at 3-4 & n.6.

[37] MCI Comments at 10-11 & n.18.

[38] US West Reply at 11-12, *citing Phase I Order*, 104 FCC 2d at 1041.

[39] *US West Ex Parte Letter*, Attachments A & B.

[40] *Phase I Reconsideration*, 2 FCC Rcd at 3068 n. 261.

[41] *Phase II Reconsideration* at para. 34.

[42] Plan at 17.

[43] US West ONA Plan at 354 & n.198.

[44] Telenet Comments at 6, *citing* US West ONA Plan at 354 n.198.

[45] Telenet Comments at 6.

[46] Reply at 10, *citing* US West ONA Plan at 354 n.198.

[47] Reply at 10-11.

[48] *Phase I Order*, 104 FCC 2d at 1042, para. 165.

[49] *Phase I Reconsideration*, 2 FCC Rcd at 3051, para. 111.

[50] Plan at 17.

[51] ANPA Comments at 5.

[52] US West Reply at 8.

[53] *See* Ex Parte Letter from Elridge A. Stafford, Director-Federal Relations, US West, to Donna Searcy, Secretary, FCC, dated December 16, 1988.

[54] *Phase I Order*, 104 FCC 2d at 1048-52, paras. 173-82.

[55] Plan at 15.

[56] *See US West Ex Parte Letter*, Attachment A.

[57] MCI Comments at 10; ANPA Comments at 8.

[58] ANPA Comments at 8, *citing* ANPA ONA Comments, CC Docket 88-2, filed Apr. 18, 1988, at 25-26. ANPA's ONA Comments argue that ONA services provided as part of a jurisdictionally interstate service must be federally tariffed. ANPA emphasizes that the need for separate review of interstate rates is important in light of the BOCs' avowed intention to employ non-cost factors in setting state rates for ONA services. ANPA ONA Comments at 25-26.

[59] *US West Ex Parte Letter*, Attachment A.

[60] MCI Comments at 8-9.

[61] Telenet Comments at 2-5.

[62] ATSI Comments at 9-10, *citing* ATSI ONA Comments, CC Docket No. 88-2, Phase I, filed Apr. 18, 1988, at 29-30.

[63] AT&T Comments at 1-2.

[64] US West Reply at 6-7 & n.15.

[65] *Id.* at 7-8, *citing* Pactel Order, 3 FCC Rcd 1095.

[66] US West Reply at 6 n.15, *citing Pactel Order*, 3 FCC Rcd at 1103, paras. 72-3. The Commission found that many ESPs currently use local business lines and pay intrastate rates for their access connections to LEC central offices, even when ESPs are providing interstate service. The Commission also stated that ATSI had not indicated which forms of interstate access, if any, that its members would need that were not available under the Pacific tariff. *Pactel Order*, 3 FCC Rcd at 1103 n.114.

[67] *Id.*

[68] *See BOC ONA Order* at paras. 309-312, 278-279.

[69] *Id.* at paras. 281-282.

[70] US West, of course, files federal access tariffs now, and any ESP, including any VMS provider, may purchase services from such tariffs for use in their interstate enhanced offerings. *See* First Data Resources, Inc., *Memorandum Opinion and Order*, Mimeo No. 4732, released May 28, 1986. We do not mean to suggest that US West, or any exchange carrier, can restrict the ability of ESPs to obtain access services from existing federal tariffs.

[71] *Phase II Order*, 2 FCC Rcd at 3093-98.

[72] Telenet argues generally that the current CPNI rules are unfair and create a discriminatory double standard between BOC and non-BOC ESPs. *See Telenet Comments at 7. Telenet also asserts that such disparate treatment is contrary to the nondiscrimination provisions contained in the March 7 decision of the Modified Final Judgment (MFJ) court. Id., citing United States v. Western Electric Co.*, Civ. Act. No. 82-0192, n.40 (D.D.C. Mar. 7, 1988) *(March 7 MFJ Order), further order*, (D.D.C. June 22, 1988). Such arguments are, of course, misplaced in a proceeding to review a particular CEI plan.

[73] Plan at 19, *citing* US West ONA Plan at 370-79; US West ONA Plan Amendment at 7-12 (Plan, Exhibit H).

[74] US West ONA Plan at 373 (Plan, Exhibit H).

[75] ATSI Comments at 5-6.

[76] ANPA Comments at 8.

[77] Reply at 12-13, citing US West Reply Comments at 89-91 (Reply, Exhibit A).

[78] The first method proposed would apply to electronic data base systems containing CPNI that are used by enhanced service personnel, and would mark or flag "restricted accounts," notifying the enhanced services employee that it may only be accessed by "network only" personnel. The second method would restrict access to other data base systems containing CPNI to "network only" personnel, who could only release records to enhanced service employees if those records pertain to non-restricted accounts. US West ONA Reply at 91 n.220 (Reply, Exhibit A).

[79] *Id.* at 90 (Reply, Exhibit A).

[80] *See BOC ONA Order* at paras. 429-430.

[81] US West ONA Plan at 371 (Plan, Exhibit H).

[82] ATSI Comments at 3-4 & n.6, *citing* US West ONA Reply Comments, CC Docket No. 88-2, Phase I, filed May 31, 1988, at 90 n.218.

[83] US West ONA Plan Amendment at 8-9 (Plan, Exhibit H).

[84] ATSI Comments at 4-5 & n.9.

[85] Reply at 12 & n.33.

[86] *See* US West ONA Reply Comments at 86-88.

[87] We conditioned our approval of Southwestern Bell Telephone Company's CEI plan for VMS on a similar commitment by Southwestern. *SWBT Order* at para. 37.

[88] US West ONA Plan at 375 (Plan, Exhibit H).

[89] ANPA Comments at 8.

[90] US West ONA Reply Comments at 89 (Reply, Exhibit A).

[91] *Phase II Order*, 2 FCC Rcd at 3082, para. 73.

[92] *See BOC ONA Order* at paras. 483, 481.

[93] Plan at 16 & Exhibit E.

[94] Plan at 18 & Exhibit G.

[95] ANPA Comments at 7, *citing Pactel Order* at 1101-02, para. 61.

[96] US West Reply at 9-10 & n.26, *citing* US West ONA Plan at 391-403; US West ONA Plan Amendment at 1-7. US West observes that it has sought permission to substitute an annual affidavit for installation and maintenance reports. US West Reply at 10 n.26.

[97] *See* Plan, Exhibit G.

[98] *See BOC ONA Order* at paras. 467-473.

[99] The additional detail on trouble reports the Commission required in the *Pactel Order*, which ANPA requests we apply to US West in this proceeding, was related to the quality reporting requirement. Since the Commission has eliminated that requirement altogether, we, of course, reject ANPA's request for more detailed quality reporting.

[100] In the Plan, US West has proposed to file quality reports comparing installation and maintenance for basic services provided its own enhanced service operations with that provided competing ESPs. The Commission in the *Phase II Reconsideration* stated that a BOC could revise its installation and maintenance reports to compare installation and maintenance intervals provided its own enhanced service operations with intervals provided to a sampling of all customers using each service on which it will report, provided that the BOC: (1) include a detailed description of its installation and maintenance procedures that demonstrates that it lacks the ability to discriminate, and (2) file on an annual basis an affidavit with the Commission stating that the installation and maintenance reports filed during the preceding year are true, accurate, and comply with our requirements, and that it has not, in fact, discriminated in the installation and maintenance of basic services. *Phase II Reconsideration* at 1161, paras. 83-84. In its ONA plan, US West did not propose to use this revised reporting option, and the Commission found that it had not made the requisite showing that would entitle it to take advantage of this option. Accordingly, US West remains subject to the requirements established in the Phase II Order for nondiscrimination reporting. *See Phase II Order* at 3086, paras. 99-100; *BOC ONA Order* at para. 483. However, since US West's proposal for installation and maintenance reporting in this CEI Plan is consistent with the requirements of the Phase II Order and does not take advantage of the options for revised reporting discussed in the *BOC ONA Order*, we approve its use for CEI purposes.

[101] MCI argues that the Commission should not approve any more CEI plans until the BOCs have submitted acceptable ONA plans. MCI Comments at 7. *See also* Telenet Comments at 2. We have rejected such arguments in approving other CEI plans. *See, e.g., SWBT Order* at paras. 47-49.

[102] ATSI Comments at 7-8, *citing* US West ONA Plan at 362.

[103] ATSI Comments at 8, *citing* ATSI ONA Comments at 21.

[104] ATSI Comments at 8-9 & n. 18, *citing* Detariffing of Billing and Collection Services, 102 FCC 2d 1150 (1986) *(Billing Detariffing Order)*.

[105] ATSI Comments at 9. US West states that it has fully addressed this issue in its ONA reply comments and incorporates that discussion by reference. US West Reply at 2 n.3. The US West ONA reply comments argue that because the Commission deregulated billing services in its *Billing Detariffing Order*, billing is not properly treated as a BSE, nor is US West required to offer billing on equal terms and conditions to ESPs as to its own enhanced operation. US West ONA Reply Comments at 78-79.

[106] *E.g., Pactel Order*, 3 FCC Rcd at 1104, para. 80.

[107] The Commission has required the BOCs to submit additional information on billing services in their ONA plan amendments to be filed in May 1989.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-371

In re Applications of

BREAUX BRIDGE BROADCASTERS, LIMITED PARTNERSHIP	File No. BPH-851115MY
ATCHAFALAYA BROADCASTING COMPANY, INC.	File No. BPH-851115NJ
J. B. C., INC.	File No. BPH-851115NL

For a Construction Permit for
a New FM Station on Channel 243A
in Breaux Bridge, Louisiana

Appearances

Dennis J. Kelly on behalf of Breaux Bridge Broadcasters, Limited Partnership; *Joseph A. Belisle* on behalf of Atchafalaya Broadcasting Company, Inc.; and *David Tillotson* and *Susan A. Marshall* on behalf of JBC, Inc.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: January 3, 1989; Released: January 13, 1989

1. This proceeding was designated for hearing to compare three applicants for commercial FM broadcast Channel 243A at Breaux Bridge, Louisiana. *Hearing Designation Order*, 2 F.C.C. Rcd 5579 (1987). The following issues will be decided in this decision:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if any.

2. A prehearing conference was held on November 23, 1987. Hearing sessions for oral examination of witnesses were held on April 11, 12, and 13, 1988. Proposed findings and conclusions of law were filed by the three applicants on June 22, 1988 and they filed replies on July 27, 1988.

FINDINGS OF FACT

Diversification of Ownership of Mass Media

3. Breaux has no mass media interests. Breaux Exh. 1, at 2. Breaux's only general partners have associations with mass media interests. Sharon J. Scheuermann is presently employed by stations WJBO(AM)/WFMF(FM), Baton Rouge, Louisiana, as a sales person and Delores Gail T. Ardoin is employed at Sides and Associates, a Lafayette, Louisiana advertising and public relations firm. Breaux Exh. 1, at 2. Neither have stated they will relinquish their positions if a grant is made. Atchafalaya and its principals have no mass media interests. Atchafalaya Exh. 2, at 3; Exh. 3, at 2; Exh. 4, at 2; and Exh. 5, at 1. JBC's proposed general manager, William Jackson, holds interests in two radio stations which he will divest if a grant is made to JBC. JBC Exh. 2, at 3. Stanley S. Sherman, a JBC owner, would also divest his media interests. JBC Exh. 3, at 1-2. David Tillotson and his spouse, Victoria Tillotson, have interests in broadcast stations. Atchafalaya Exh. 15, at 5. However, David Tillotson sold his interest in JBC before the B cutoff.

Integration Proposals

Breaux

4. Breaux does not seek any integration credit. Breaux Exh. 1, at 2.

Atchafalaya

5. Atchafalaya has four stockholders. Walfred A. LeBlanc, Jr., Pattie B. Dupuis, and Rita D. George; they each own 100 shares of Class A voting common stock or 25% of the total equity. Richard E. Zuschlag owns the remaining 25% equity; he owns 100 shares of Class B nonvoting stock. Atchafalaya Exh. 1 at 1. Ms. Dupuis, Ms. George, and Mr. LeBlanc are also the officers and directors. *Id.* Ms. Dupuis' spouse, Blaise Dupuis, is employed by Mr. Zuschlag, who is Mr. Dupuis brother-in-law. Tr. 57, 91-2.

6. Walfred LeBlanc proposes to work 40 hours per week, full time, as the general manager/technical director of the station. Atchafalaya Exh. 2, at 2. He will be responsible for "all aspects of the station's well being." *Id.* He will supervise construction and set policies for regulatory compliance. *Id.* All managerial employees will report to him. *Id.* Mr. LeBlanc is president of the applicant. *Id.* Mr. LeBlanc lives in Lafayette, Louisiana, which is within the proposed service area; he has lived there since 1967. Atchafalaya Exh. 2, at 3. Mr. LeBlanc belongs to the Lafayette Chamber of Commerce and the Lafayette Parish Junior Deputy organization. *Id.* Mr. LeBlanc has worked as a part-time technical employee at KSLO in Opelousas, Louisiana. Atchafalaya Exh. 2, at 1. From December 1962 to 1964, he has worked on weekends for about three hours at KSLO. Tr. 170, 171. From sometime in 1964 to the present he has continued to work at the station on weekends on an as needed basis, which amounts to about 10 hours per year. Tr. 172. From May 1964 to August 1965 he worked at KATC, Lafayette. Atchafalaya Exh. 2, at 1. This was a full-time technical position. Mr. LeBlanc represents that he has also worked for other stations on an as needed basis over the years. *Id.*

7. The only other Atchafalaya owner to participate in management is Pattie B. Dupuis. Ms. Dupuis would leave her current job and proposes to work full time, 40 hours per week, as the station's sales and office manager. Atchafalaya Exh. 3, at 2. In those positions she will "maintain the station's equal opportunity program," supervise the sales staff, and be responsible for the collection of accounts receivable. *Id.* She is also a director and officer of the applicant. *Id.* Ms. Dupuis has lived in Breaux Bridge since 1956, all of her life. Atchafalaya Exh. 3, at 1, 2. Three to five years ago, Ms. Dupuis claims she belonged for one year to the Jaycees and Catholic Daughters. *Id.*, at 2. Tr. 162-63. Ms. Dupuis is female. Atchafalaya Exh. 3, at 1.

8. Atchafalaya has included in the past and intends to include in the future, Richard Zuschlag, in discussions about the operation of the station. Atchafalaya Exh. 1, at 1. Rita George, who is an officer and director, proposes to be integrated but, because she would not appear at the hearing, Atchafalaya does not seek comparative credit for her proposed integration. Tr. 268, 305, 313-14. Richard Zuschlag and Walfred LeBlanc approached Blaise Dupuis, Patti Dupuis' spouse, to apply for the Breaux Bridge facility with them because he lived in Breaux Bridge and knew the community. Tr. 178-79. He declined to participate, according to Mr. LeBlanc, because of his job at Mr. Zuschlag's ambulance service. *Id.* Mr. Dupuis, however, helped formulate the operating budget for the station (Tr. 256), participated in discussions about how the applicant should be organized (Tr. 203) and helped determine what roles the principals are to play at the station. Tr. 51-52. He also negotiated the bank loan (Tr. 183-84, 253-54), holding himself out as a representative of the company. The bank letter was addressed to Blaise Dupuis as President of Atchafalaya. Tr. 184, 302. He also made attempts to negotiate a settlement after the application was filed. Tr. 92-94, 152-53, 158-62. Messrs. Zuschlag and LeBlanc in general had more contact with Mr. Dupuis than Ms. Dupuis about the proposal.

9. Ms. Dupuis purchased her stock with money from an account she shares with her spouse. Tr. 89, 90. The additional money she has provided has come from the joint account and from a $4,000 loan to both Ms. Dupuis and her spouse from Mr. Zuschlag. Tr. 109-11. Ms. Dupuis was aware of her contributions to Atchafalaya but she did not know whether she would be repaid. Tr. 103-04. She knew only that Mr. LeBlanc had spoken to her spouse about contributing the additional funds. Tr. 105. She had talked with Blaise Dupuis about money but she assumed he had some understanding with Messrs. LeBlanc and Zuschlag about the expenses for the proposal. Tr. 105-06. Ms. Dupuis was unaware of Atchafalaya's finances, but she assumed her husband knew about them. Tr. 106-08.

10. While Ms. Dupuis' spouse obtained the bank letter, she had never seen it, she did not know whether the money would be available for construction of the station, or whether the bank would require her to provide a personal guarantee. Tr. 88-89, 113-14, 135. Ms. Dupuis did not know anything about settlement negotiations, except that her spouse engaged in discussions with principals of Breaux. Tr. 92-94, 152-53. Ms. Dupuis never requested that her spouse act on her behalf in company matters. Ms. Dupuis did not know who she would supervise. Tr. 128-29. She has not discussed her job or her salary with the other principals. Tr. 66, 80, 84. She did not know who would set the advertising rates for the station; she has never seen a budget for the sales department and does not know if one exists. Tr. 127. Ms. Dupuis is the City Clerk for Breaux Bridge. Atchafalaya Exh. 3, at 1. She is responsible for the operation of the city departments and her office employs 60 persons. *Id.* The city clerk is responsible for the city's purchase orders, payment of bills, books, collection of taxes, payments to the city operated utility, issuance of building permits and occupational licenses. *Id.* She also assists the mayor in responding to public inquiries. *Id.*

JBC

11. JBC has two owners, William D. Jackson and Stanley S. Sherman. JBC Exh. 1, at 1. Mr. Jackson proposes to work full time, 40 hours per week, as the station's general manager. JBC Exh. 2, at 1. He will supervise construction of the station and when constructed, he will manage and supervise all station operations. *Id.* He will also work as the station's chief engineer. *Id.* Mr. Jackson will move to Breaux Bridge from Leland, Mississippi. *Id.* He began working in broadcasting in 1955. Since then he has worked at radio and television stations as an announcer, engineer, manager and owner. *Id.*, at 2-3. Mr. Jackson is black. Stanley Sherman does not propose to participate in the management; he is a nonvoting, passive investor. JBC Exh. 3, at 1.

12. Currently, JBC is organized as a Louisiana corporation with voting and nonvoting stock. JBC Exh. 1. Mr. Jackson is president, secretary, treasurer, the only director, and holds 100% of the voting stock. *Id.* He also owns 166.5 shares of nonvoting stock and his stock interests represent 50% of the equity. Mr. Sherman owns the remaining nonvoting stock and 50% of the equity of JBC. *Id.* Sylvia Jackson, William Jackson's spouse, is the assistant secretary of JBC. *Id.* Initially, Mr. Jackson held one-third of the equity of the corporation and Stanley Sherman and David Tillotson owned two-thirds of the voting stock. Tr. 384, 386-87, 435. Before the B cutoff, Mr. Tillotson sold his shares to Messrs. Sherman and Jackson. Tr. 376-77, 382, 613.

13. The Articles of Incorporation of JBC, as originally filed with the Secretary of State of Louisiana, gave as the corporation's name Jackson Broadcasting, Inc. (Atchafalaya Exh. 28, at 9-13), and authorized the corporation to issue fewer shares of voting and nonvoting stock than have actually been issued. Atchafalaya Exhs. 28 and 31; Tr. 462-63, 508. These inconsistencies were corrected by filing with the Secretary of State of Louisiana an amendment to JBC's Articles of Incorporation on March 17, 1988. JBC Exh. 4; Tr. 394, 545. The principals of JBC maintain that they have always regarded the corporation, which was incorporated as Jackson Broadcasting, Inc., and the corporation JBC, Inc. as one and the same. Tr. 362-63, 404, 446-47 and 462. JBC Exhs. 6 and 8; Atchafalaya Exh. 30, at 1-2. The basic agreement among the owners about ownership of JBC was reflected in a November 4, 1985 Memorandum of Agreement. Atchafalaya Exh. 13. The existing corporate structure and the use of the corporate name "JBC, Inc." was also reported in JBC's Subchapter S election, dated January 1987, which was filed with the IRS (JBC Exh. 6) and in its income tax returns filed with the federal and state governments. JBC Exh. 8.

14. JBC urges that the mixup between the filings made to the Commission and the IRS and the State of Louisiana about its name and authorized shares was due to a misunderstanding between Mr. Jackson and local counsel. Tr. 363, 446-47. When local counsel filed the Articles of Incorporation in early December 1985, he made the filing in the name of Jackson Broadcasting, Inc., not JBC, Inc. as intended by the principals. *Id.* Mr. Jackson said he did not check the Articles to see how many shares were authorized before deciding how many shares to issue to the stockholders in exchange for their capital contributions. JBC's principals maintain, however, that they have always believed that Jackson Broadcasting, Inc. and JBC, Inc. were the same corporation and they have operated under that assumption. Tr. 362-63, 404, 446-47, 462; JBC Exhs. 6 and 8; Atchafalaya Exh. 30, at 1-2. When the error was discovered, JBC amended the Articles filed in Louisiana. JBC Exh. 4. The Articles originally filed in November 1985 designated the same officers and directors that JBC represented to the Commission as being its officers in JBC, Inc. Tr. 397-98; Atchafalaya Exh. 28, at 14. The principals paid for their stock and certificates were issued on January 29, 1986. Tr. 365, 384, 386, 462-63, 465-66, 610-11; Atchafalaya Exh. 30, at 2-3 and Exh. 31, at 1 and 4. David Tillotson negotiated with Jackson and Sherman for the sale of his shares and the shares were endorsed to them effective April 1, 1987 because that was the date on which Mr. Tillotson believed they had reached an agreement. Tr. 369-70, 376-77, 379. The sale was reported to the Commission on April 16, 1987. Mr. Tillotson sold his shares because he believed that under Commission rulings he would not be considered a passive investor. Tr. 370, 375. He advised Messrs Jackson and Sherman and he withdrew from the proposal before the B cutoff date. *Id.*

15. Mr. Sherman's activities include review of JBC materials which Mr. Jackson has shown to him. Tr. 600-01. He has also had telephone discussions with counsel about the status of this proceeding (Tr. 604), he has been asked about the corporate structure of the applicant and strategy and, at Mr. Jackson's request, he accompanied him to Louisiana to locate a transmitter site. Mr. Jackson is black and Mr. Sherman is white; Mr. Jackson believed having Mr. Sherman along when he went to obtain a site would be helpful because of his color. Tr. 509-10, 532, 603.

16. Mr. Jackson and Mr. Sherman are longtime business associates. In 1972 they became general partners in Interchange Communications which was awarded the permit for WBAD(FM), Leland, Mississippi. JBC Exh. 2, at 2; Tr. 483-84. When it was later incorporated they both became officers and directors (Tr. 484-85) and that arrangement continues. JBC Exh. 2, at 2; JBC Exh. 3, at 1. They are also officers, directors and shareholders of East Delta Communications, Inc. JBC Exh. 2, at 2. JBC Exh. 3, at 1. East Delta is the licensee of WESY(AM), Leland, Mississippi. JBC Exh. 2, at 3. East Delta has also applied for stations in Carthage, Texas and Greenwood, Mississippi. Atchafalaya Exh. 15, at 5. Mr. Sherman was not proposed to be integrated in Carthage but he was in Greenwood. Tr. 486-87. Messrs. Jackson and Sherman have been officers, directors, and shareholders in two cable businesses (Tr. 478-81, 482) and general partners in a business to refurbish mobile homes. Tr. 487-88, 601. This application is the first venture they have entered where Mr. Sherman proposes to be passive. Tr. 507, 601. Mr. Sherman, at Mr. Tillotson's suggestion, is a passive owner apparently for no other business reason except to receive 100% comparative credit for Mr. Jackson's integration promise. Tr. 507. Mr. Sherman currently participates in the operation of WESY(AM) for two or three hours per day but he has no particular job. Tr. 600.

Auxiliary Power

17. Breaux, Atchafalaya, and JBC propose auxiliary power. Breaux Exh. 1, at 2; Atchafalaya Exh. 6, at 1; and JBC Exh. 1, at 2.

CONCLUSIONS

Diversification of the Media of Mass Communications

18. Breaux, Atchafalaya, and JBC as entities do not have interests in the media of mass communications. Breaux's general partners have associations with mass media interests which they intend to maintain. Breaux general partner Sharon J. Scheuermann is a sales person for two Baton Rouge broadcast stations, WJBO(AM)/WFMF(FM) and Breaux general partner Delores Gail T. Ardion is employed at a Lafayette advertising and public relations firm. These interests do not weigh against Breaux, however, because only "significant managerial positions in stations and other media" are considered; neither one of these positions meets that definition. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 394 n.5 (1965).

19. While some of the owners of the applicants currently have broadcast ownership interests or employment associations, they have made timely promises to divest the interests or associations. Atchafalaya argues that William Jackson's promise to divest his controlling interests in two Mississippi stations is "imperfect" because he stated that, while he would divest the stations, he could not rule out the purchase of other stations with the proceeds. Tr. 524-26. How Mr. Jackson purports to use the proceeds from the divestiture would be important if Mr. Jackson's promise was made in bad faith. For example, if he intended to divest and had plans to immediately purchase more stations. But, Mr. Jackson said that he did not know if he would and indicated that he did not have any plan to do so. Tr. 525. When asked if he would rule it out, he said he would not. Tr. 526. Those statements are insufficient evidence to support the claims that Mr. Jackson is divesting to gain a comparative preference and then will immediately purchase other stations to substitute for those sold. In addition, Breaux argues that JBC's amendment making the divestiture pledge should not be considered because JBC was not legally incorporated when the promise was made. Whether or not JBC was legally incorporated does not affect the divestiture pledge, however, because they were not promises made by JBC to divest interests which it holds, they were instead promises made to divest media interests held by the individuals who own JBC. Any promise made by them would be binding regardless of JBC's reorganization. Atchafalaya also urges with regard to JBC that the small stock interests held in stations by Mr. Tillotson and his spouse should be considered because they have not promised to divest those interests. But Mr. Tillotson decided before the B cutoff that he would sell his interest in JBC and the Commission was informed before the B cutoff that he would not participate. Under these circumstances, neither of the Tillotsons'

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media interests will be weighed. No demerit will be assessed against JBC. JBC, Breaux, and Atchafalaya have no cognizable media interests and, therefore, on the criterion of diversification, they are equal.

Integration of Owners Into Management

20. Breaux does not propose that its owners will work as managers of the facility. Atchafalaya proposes that two stockholders, Walfred LeBlanc and Patti Dupuis, will participate in management. They own 50% of Atchafalaya's equity and two-thirds of its voting stock. While 25% of Atchafalaya's equity is owned by Richard E. Zuschlag, who owns nonvoting stock, Atachafalaya concedes that Mr. Zuschlag has not been and will not be insulated from participating in decisions about the station. There is one other voting shareholder, Rita George, who owns one-third of the voting stock and 25% of the equity, but her integration promise was withdrawn. Because Mr. Zuschlag is not insulated, the designation of stock as voting and nonvoting does not affect control. Under Atchafalaya's operating arrangement, Ms. Dupuis, who proposes to work full time as the sales and office manager, and Mr. LeBlanc, who proposes to work full time as the general manager/technical director of the station, control no more than 50% of Atchafalaya.

21. However, the record reflects that Patti Dupuis does not exercise full control over her interest; her spouse, Blaise Dupuis, has made almost all decisions involving her interest and he has made those decisions without consulting with her or pursuant to her delegation. Ms. Dupuis was selected to own, rather than her spouse, because Mr. Dupuis works full time for his brother-in-law, Richard Zuschlag, who owns 25% of Atchafalaya's equity, and does not want to leave his job. (The record reflects that the parties believe that this station will not be easy to establish as a profitable entity and Mr. Dupuis has concluded that the financial risk is too great for him to quit his job at Mr. Zuschlag's ambulance service.) Mr. Zuschlag wanted Mr. Dupuis to participate because he lives in Breaux Bridge; neither Mr. Zuschlag nor Mr. LeBlanc, the two stockholders who originated the application, live in Breaux Bridge. Messrs. Dupuis, Zuschlag, and LeBlanc work in Lafayette, Louisiana, which is nearby. Because of their work relationship, they have made all decisions about Atchafalaya's proposal. While Ms. Dupuis has never asked her spouse to act on her behalf, he has routinely made decisions about her interest and undertaken projects for Atchafalaya. For example, when both Mr. and Ms. Dupuis were present at meetings to discuss the proposal, Mr. Dupuis made the decisions. He prepared the operating budget, obtained bank financing, participated in selecting positions for the integrated stockholders, helped make decisions about the applicant's organization and held himself out as a representative of the applicant. The letter from the bank to Atchafalaya is addressed to Mr. Dupuis as Atchafalaya's president. When financial contributions had to be provided by Ms. Dupuis, it was Mr. Dupuis who was consulted by Mr. Zuschlag about making them and it was Mr. Dupuis who made the decision to contribute.

22. Ms. Dupuis was generally aware of what had been done by her spouse and what her role would be in the applicant, but it is apparent that thus far she has been passive and her spouse has been active in the affairs of the applicant. From this factual perspective, it cannot be concluded that Ms. Dupuis will exercise control over her claimed 25% legal interest. She has willingly relinquished the exercise of control over her interest to her spouse and Messrs. Zuschlag and LeBlanc.

23. Even if it were apparent that Ms. Dupuis would assert her legal interest, she has not been assigned a role at the station where there is a likelihood that she will play an important role in management and policy decisions. Her job, in part, will be to manage the office. While she will also direct sales, that position will not occupy her full time. Moreover, when she was asked who would establish the station's advertising rates, she did not know and she apparently had not even been consulted about the applicant's sales plans. It cannot be concluded that Atchafalaya's proposal to integrate Ms. Dupuis will result in legal responsibility and day-to-day performance being closely associated. Atchafalaya will be credited with only 25% of its owners fully participating in station operations.[1]

24. JBC proposes that William D. Jackson will work full time as the station's general manager. He will also serve as the station's engineer. Mr. Jackson owns 50% of JBC's equity and 100% of its voting stock. His longtime business partner, Stanley Sherman, owns the remaining equity and his stock is nonvoting. Mr. Sherman does not intend to participate in the operation of the station. Atchafalaya and Breaux urge that JBC was not sufficiently organized as an entity to warrant consideration as an applicant in this proceeding. Shortly before the hearing, on April 1, 1988, Atchafalaya petitioned to enlarge issues against JBC to consider whether JBC misrepresented its ownership to the Commission. On March 31, 1988, Breaux moved to dismiss JBC's application on the grounds that JBC did not legally exist until after the integration statements were filed in December 1987. Atchafalaya and Breaux also urge this result in their proposed conclusions.[2]

25. JBC maintains that when its local counsel filed the company's Articles of Incorporation in December 1985, he did so under the name Jackson Broadcasting Company. The testimony supports a conclusion that the Louisiana filing calling the applicant Jackson Broadcasting Company was not intended by the stockholders; it was their intention that JBC, the name reported to the Commission, should have been the name registered in Louisiana. JBC also issued more shares than permitted by the articles; this error, too, was a mistake the testimony indicates. JBC's owners claim they did not focus on these errors because they were concerned with other problems involving their application. The owners have always thought of the corporation registered in Louisiana and JBC, Inc. as the same entity. Moreover, when the errors were discovered, JBC amended the Jackson Broadcasting articles to change the name and increase the number of shares authorized. The corporate owners, the classes of stock, and the officers and directors were always consistently represented in JBC's filings before the Commission and the State of Louisiana.

26. Atchafalaya and Breaux argue that further evidence of JBC's lack of intent to legally form a corporate entity is illustrated by its failure to call a general meeting to elect its officers and directors. But, as JBC points out, it has only one voting stockholder and the officers and directors were designated in a November 1985 filing with the State of Louisiana. There is, furthermore, no evidence that the applicant did not possess a formal identity and structure at the time the application was filed. The corporate documents were filed with the State of Louisiana before the B

cutoff date; and the stock certificates had been paid for and issued before that date. The principals had also signed a written memorandum of agreement before the application was filed reflecting a corporate structure which, from that date, has never changed. That structure was the one represented to the Commission and the same as the one represented to Louisiana.

27. Atchafalaya argues that JBC acted dishonestly when David Tillotson removed himself from the application. Atchafalaya argues that stock certificates were back-dated to April 1, 1987 to precede the April 16, 1987 cutoff date but that the stock was not transferred until April 20, 1987 by Mr. Tillotson. Mr. Tillotson states that the parties reached an agreement about the purchase on April 1, 1987 and that that is why the certificates were dated on that date. Tr. 379. The negotiations for the sale began on March 19, 1987, the shares were paid for on April 10, 1987, Mr. Tillotson then told Messrs. Sherman and Jackson that he was no longer part of the applicant, and the transaction was reported to the Commission on April 16, 1987. These facts are undisputed and exhibit that the sale took place before the B cutoff date. The fact that the sale was later completed when new certificates were issued shortly after the B cutoff date does not mean the sale had not taken place before or that JBC did not act honestly in dating the certificates.

28. Breaux and Atchafalaya also argue that Mr. Tillotson should be considered an owner of JBC, but the record reflects that he sold his interest before the B cutoff and JBC notified the Commission that he had sold his interest before the B cutoff. They also urge that Mr. Sherman should be considered an active investor. The record reflects, however, that Mr. Sherman has only been informed about JBC's affairs, that he has been asked to review documents, that he has had dicussions about the status of the proposal with counsel, and that, at Mr. Jackson's request, he went to look at the tower site. Mr. Sherman accompanied him because of Mr. Jackson's concern that the site owner might not be willing to transact business with him because of his color. This level of involvement by a nonvoting stockholder does not make the proposal a sham or demonstrate that Mr. Jackson will not have exclusive control. *Victory Media, Inc.*, 3 F.C.C. Rcd 2073, 2074 (1988). The Commission, moreover, states in *Victory Media* that nonvoting interests in corporate entities are separated from control by law and do not present the same concerns as limited partnerships. Mr. Jackson currently manages the stations he owns with Mr. Sherman and, while Mr. Sherman is informed about the affairs of the stations and spends time at the stations, there is no evidence that he determines policy or manages them. His testimony indicates that he has no job at the stations and he simply drops in every afternoon for a few hours. Messrs. Sherman and Jackson have operated the stations that way since 1972.

29. Atchafalaya also urges that because Mr. Jackson now spends only 20 hours per week at his Leland, Mississippi stations, it should be assumed that he will not spend 40 hours a week at the Breaux Bridge facility, despite his promise to do so. JBC points out that Mr. Jackson spent 50-60 hours a week at the Mississippi stations for their first eight years. Tr. 533. There is nothing in Mr. Jackson's broadcast experience which indicates that he would promise one thing and do another. He has represented that he will divest the stations he now owns, move to Breaux Bridge, and operate the station full time or 40 hours per week. He has promised to work full time and more until the station is a going concern and even then, although he will delegate, he will continue to work full time. Tr. 476, 533, 587.

30. JBC is entitled to credit for proposing that its full controlling interest will also manage the station on a day-to-day basis. In this respect JBC's proposal is substantially better than Atchafalaya and Breaux. The applicants are equal in all other comparisons.

ACCORDINGLY, IT IS ORDERED that the motion to dismiss application of JBC, Inc., filed March 31, 1988 by Breaux Bridge Broadcasters Limited Partnership IS DENIED.

IT IS FURTHER ORDERED that the petition to enlarge issues, filed April 1, 1988 by Atchafalaya Broadcasting, Inc. IS DENIED.

IT IS FURTHER ORDERED that the motion for leave to file appeal, filed April 4, 1988 by Breaux Bridge Broadcasters Limited Partnership IS DISMISSED AS MOOT.

IT IS FURTHER ORDERED that the application of Breaux Bridge Limited Partnership (File No. BPH-851115MY) and Atchafalaya Broadcasting Co., Inc. (File No. BPH-851115NJ) ARE DENIED and the application of J.B.C., Inc. (File No. BPH-851115NL) for a construction permit for a new FM station on Channel 243A in Breaux Bridge, Louisiana IS GRANTED provided William D. Jackson divests his interests in stations WBAD and WESY, Leland, Mississippi prior to beginning operation with program test authority.[3]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

[1] Atchafalaya argues that because a real-party-in-interest issue was not designated, Ms. Dupuis must be credited with her bald promise to participate full time in a position with policy functions and management responsibilities. Quite aside from the character issue involved in a real-party-in-interest inquiry, the policy statement does not take at face value an applicant's claim that there is a likelihood that a principal will participate in policy decisions and management of the station. For the reasons given: First, Ms. Dupuis' spouse has, without even her permission, but apparently with her acquiescense, made all policy decisions for her and has actively participated in the planning and preparation for the station. (Ms. Dupuis has only been informed, sometimes, about the decisions after they were made.) Second, her job at the station will, in part, involve office management, a non-policy position. These are factors routinely considered as part of the standard comparative issue and they respond directly to the inquiry which the Commission has directed since 1965. *Policy Statement, supra* 1 F.C.C. 2d 393, 395. This record does not establish that Mr. Dupuis owns Ms. Dupuis' shares in the applicant or that Ms. Dupuis is holding the shares for Mr. Dupuis' benefit. But it does show that she does not exercise control over the applicant as an officer and stockholder; there is no evidence that that circumstance will not continue in the future.

[2] Breaux argues that because Mr. Jackson also owns nonvoting stock in addition to voting stock, his integration promise should be discredited. Breaux relies on a Review Board determination involving a limited partnership where the partnership agreement prohibited limited partners from participating in the operation of the partnership. In the Board's view, these general and limited partnership interests held by the same person presented inconsistent legal obligations which had an impact on the partners' integration promise. Breaux has not shown a similar inconsistency between the rights of voting and nonvoting stockholders under the documents governing JBC.

[3] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

ALEGRIA I, INC. **MM DOCKET NO. 84-159**
Marina, California File No. BP-811015AJ

Elizabeth Waters, **MM DOCKET NO. 84-160**
Phyllis Moore, File No. BP-811015AK
Gloria McKinley and
Verna Rolls, d/b/a
HERITAGE COMMUNICATIONS
Yountville, California

For Construction Permit
for a new AM Station

MEMORANDUM OPINION AND ORDER

Adopted: December 22, 1988; Released: January 13, 1989

By the Commission:

1. The Commission has before it: (1) an Application for Review of Review Board Decision filed April 23, 1987 by Alegria I, Inc. and an Opposition filed May 8, 1987 by Heritage Communications; (2) an Application for Review of Hearing Designation Order filed April 23, 1987 by Alegria, a Motion to Strike filed May 8, 1987 by Heritage, and an Opposition to Motion to Strike filed May 20, 1987 by Alegria; (3) a Petition to Reopen Record and to Enlarge Issues filed October 27, 1987 by Alegria, an Opposition to Petition to Reopen the Record and Enlarge Issues filed November 16, 1987 by Heritage, and a Reply to Opposition to Reopen the Record and Enlarge Issues filed November 25, 1987 by Alegria; and (4) a Petition for Leave to Amend filed November 16, 1987 by Heritage, an Opposition to Petition for Leave to Amend filed December 1, 1987 by Alegria, and a Reply to Opposition to Petition for Leave to Amend, (5) a Motion for Leave to File Reply, filed December 18, 1987 by Heritage, and a Motion to Strike (Reply) filed January 7, 1988 by Alegria; and (6) the mass Media Bureau's Comments on Petition for Leave to Amend, filed June 22, 1988. These pleadings relate to a decision of the Review Board granting Heritage's application for a new AM radio station at Yountville, California and denying Alegria's mutually exclusive application for a station at Marina, California. *Alegria I, Inc.*, 61 RR 2d 136 (Rev. Bd. 1986), recon. denied, 2 FCC Rcd 1762 (Rev. Bd. 1987).

I. APPLICATIONS FOR REVIEW

2. The Commission agrees with the Review Board's resolution of this proceeding, and we deny review. In this regard, we believe it would be useful to comment on several matters raised by Alegria's applications for review.

3. An initial matter relates to the fact that Alegria filed two separate applications for review – one seeking review of the decision and the other seeking review of the hearing designation order in this proceeding. Heritage has moved to strike the latter pleading. Under 47 C.F.R. § 1.115(e)(3), applications for review of hearing designation orders are deferred until applications for review of the final Review Board decision in a case are filed, unless certified by the Presiding Judge. Heritage argues that Alegria should have filed a single ten-page pleading addressing both the hearing designation order and the Board decision. We did not, however, intend that the deferral provision should abridge a party's right to file a full five-page application for review of the hearing designation order. Consequently, the filing of two pleadings (ten pages for the Board's decision and five pages for the designation order) or, alternatively, a consolidated 15-page pleading is acceptable. We therefore deny Heritage's motion to strike Alegria's application for review.

4. We also wish to comment on four contentions raised by Alegria in its application for review of the Board's decision. First, Alegria argues that the ALJ in this case erred by admitting into evidence exhibits concerning Heritage's integration and diversification showings. We find no error in the ALJ's action. However, in any event, this matter is moot, because the Board decided this case based on the relative need for new service of the two proposed communities of license – Yountville and Marina. Consequently, the Board did not reach the contingent comparative issue, including the questions of integration and diversification. Second, Alegria asserts that inconsistencies in the testimony of Heritage principal, Phyllis Moore, raise the question of whether Heritage posseses the requisite character to be a Commission licensee. Here too we find no merit to Alegria's allegations. Moreover, Alegria failed to raise the issue of character before the Board and thus waived that issue. 47 C.F.R. § 1.277(a). Third, Alegria argues that the ALJ in this case deprived it of due process by disregarding its pleadings, violating Commission procedures, and relying heavily on Heritage's proposed findings and conclusions. Alegria, however, does not demonstrate that any of the ALJ's actions was improper or materially prejudiced Alegria. Finally, Alegria contends that a transmitter site proposed by Heritage – located on Soda Canyon Road in Napa, California – poses environmental problems. As we discuss below, however, Heritage no longer proposes to use this site, and the issue is therefore moot. Additionally, Alegria fails to specify with particularity the questions warranting review of this issue in its application for review. 47 C.F.R. § 1.115(b)(5).

II. PETITION TO REOPEN THE RECORD AND TO ENLARGE ISSUES AND PETITION FOR LEAVE TO AMEND

5. In its petition (filed October 27, 1987), Alegria asserted that Heritage's proposed transmitter site is unavailable and that Heritage failed to report this defect in its proposal in a timely manner. Previously, Heritage had proposed to locate its daytime transmitter on property owned by Jean and Ronnie Soeland at 2001 Soda Canyon Road in Napa, California. Heritage had submitted a purchase option agreement with the Soelands dated November 17, 1986.

6. Alegria stated that on October 20, 1987 Heritage's principals appeared before the Napa City Council seeking permission to lease a portion of the city's Conn Watershed property along the city reservoir at Lake Hennessey. According to Alegria, Heritage's approach to the City Council confirms that Heritage has lost access to the Soelands' property.

7. In support of this contention, Alegria submitted correspondence which it obtained from the Soelands' attorney. The correspondence indicates that on July 21, 1987 the Soelands informed Heritage that a third party had made a $325,000 offer for the property and informed Heritage that, under the purchase option, it had 10 days to make a counteroffer of $325,000. On July 30 and August 7, Heritage wrote to the Soelands complaining that the proposal did not comply with the terms of the purchase option. However, on August 20, Heritage notified the Soelands that it intended to exercise the purchase option. The Soelands replied on September 3: "Please be advised that Mr. and Mrs. Soeland do not intend to sell said property to [Heritage] because the exercise of the option is not timely pursuant to the terms and conditions of the Real Estate Purchase Option Agreement dated November 17, 1986." Letter from Terry A. Duree (the Soelands' attorney) to Richard H. Zeller (Heritage's attorney) dated September 3, 1987.

8. Alegria contended that, in view of the dispute between Heritage and the Soelands, Heritage has not had reasonable assurance that the Soelands' property is available for several months and that, under 47 C.F.R. § 1.65, Heritage was obligated to report that fact to the Commission within 30 days.

9. Heritage responded on November 16, 1987 indicating that despite the language of the September 3 letter, it has had reasonable assurance that the Soelands' property was available until November 12, 1987, when Heritage and the Soelands mutually terminated the purchase option. Heritage, relying on an affidavit by Terry A. Duree, the Soelands' attorney, claimed that the correspondence relied on by Alegria merely represented negotiating tactics by the Soelands that did not affect the availability of the property. Heritage stated that it was amending its proposal to specify a new site.

10. Heritage accompanied its November 16, 1987 response with an amendment to its application proposing to lease a parcel of land on the shore of Lake Hennessey, owned by the City of Napa. Alegria opposed acceptance of this amendment by the Commission.

11. In its opposition to the amendment, Alegria argued that there is not good cause to permit Heritage to amend its transmitter site proposal under the standards of *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 ¶ 7 (Rev. Bd. 1970). Under *O'Conner*, good cause exists if: (1) the moving party acted with due diligence; (2) the amendment was not required by the voluntary act of the applicant; (3) the amendment will not necessitate modification or addition of issues or parties; (4) the amendment will not disrupt the orderly conduct of the hearing; (5) the amendment will not unfairly prejudice other parties; and (6) the amendment will not cause the applicant to gain a competitive advantage. *Id.* Additionally, because the amendment involves an engineering proposal, good cause requires that the amendment be necessitated by events which the applicant could not reasonably have foreseen. 47 C.F.R. § 73.3522(b)(1)(i). Alegria argued that the amendment should not be accepted because Heritage lacked due diligence in failing, for two to four months, to notify the Commission that it had lost its former site and to secure a new site. Alegria also claimed that Heritage lost its former site through its own voluntary and foreseeable action by failing to exercise the purchase option in a timely manner. Alegria complained that it has been prejudiced because Heritage has already been permitted to amend its transmitter site proposal several times.

12. Alegria next argued that accepting the amendment would require the specification of new issues in addition to the reporting matter already discussed. According to Alegria, Heritage has failed to demonstrate reasonable assurance that its new proposed site is available. Referring to the pertinent resolution of the Napa City Council and related documents, Alegria asserted that the council merely gave "conceptual approval" for the use of its property and authorized city officials to negotiate a lease. According to Alegria, a mere intention to negotiate a lease in the future falls short of the firm understanding necessary to establish a reasonable assurance of availability. Alegria also submitted an affidavit by a private investigator, indicating that there have been no further negotiations between the city and Heritage since October 20. Thus, Alegria maintained that Heritage misrepresents the availability of the site.

13. Next, Alegria, relying on a statement by its consulting engineer, Raymond E. Rohrer, argued that the proposed Lake Hennessey property is unsuitable for use as a transmitter site. Alegria claimed that the hilly terrain of the site makes it impossible to reliably predict the proposed station's coverage contours and potentially subjects nearby stations in Apple Valley and Gardnerville to prohibited interference. Alegria further claimed that preparing the site would require extensive grading, which would create an environmental problem due to excessive runoff of silt into Lake Hennessey. *See* 47 C.F.R. § 1.1307(a)(5).

14. Heritage replied that it has shown good cause for amending its proposal, that it did not violate 47 C.F.R. § 1.65, and that its new site is available and suitable.

15. Specifically, Heritage contended that it did not lose its former site until November 12, 1987, when it voluntarily terminated the purchase agreement with the Soelands and had already secured its new site from the City of Napa. Heritage submitted a sworn declaration by Terry A. Duree, the Soelands' attorney supporting Heritage's position that the correspondence relied on by Alegria gives a misleading impression of the conflict between Heritage and the Soelands, because it reflects the Soelands' negotiating tactics. According to Duree (and Heritage), the true disagreement between Heritage and the Soelands concerned the price provision in the purchase option. Duree confirms that Heritage was attempting to enforce a provision of the purchase option requiring that the price for the property be determined by independent appraisal, whereas the Soelands were attempting to induce Heritage to pay the higher price of $325,000 offered by the third party. Duree also confirms that, despite the seemingly preemptory language of the September 3 letter, the Soelands were always willing, even after September 3, to sell the property to Heritage for $325,000. Declaration of Terry A. Duree at 1-2.

16. Heritage explained that, although the Soelands' property remained available, it wished to avoid the dilemma of having to sue the Soelands' to enforce the price

provision of the purchase option or to pay an exorbitant price. Therefore, according to Heritage, it sought an alternative site from the City of Napa.

17. In this regard, Heritage claimed that it has a firm oral understanding with the City of Napa to lease the Lake Hennessey site. In support of this contention, Heritage submitted sworn declarations by Napa City Manager David Finigan and Napa Water Engineering Supervisor John W. Stewart. Finigan corroborates Heritage's assertion that city personnel met with Heritage's principals and reached an oral understanding that the city would lease the Lake Hennessey property for seven years with a seven-year optional extension, at a rental rate commensurate with prevailing city rates. Finigan explains that the City Council resolution to which Alegria referred approved a staff recommendation to this effect, subject to the drafting and approval of the lease itself.

18. Stewart provides additional details of the negotiations between Heritage and the city. Stewart recounts that on September 22, 1987 he inspected property along Lake Hennessey with a Heritage representative and agreed on a site. A staff recommendation that the site be leased was then placed on the City Council agenda. Subsequently, however, Dale Mortensen (of the city Communications Department) expressed concern that the proposed transmitter might interfer with nearby city computer facilities. As a result, the City Council delayed its consideration of the proposal while Stewart, Mortensen, and a Heritage principal conducted a further examination of the site. The city officials concluded that concerns about interference were not as serious as they had supposed. The City Council then approved, on October 20, the lease proposal with the caveat that if interference problems could not be resolved the site would be relocated or removed.

19. Heritage also denied that its site is unsuitable. Heritage's consulting engineer, Lawrence L. Morton, states that Alegria's claim that the terrain is excessively hilly is based on an inaccurate topographic map and that first-hand inspection of the site -- including inspection by a licensed surveyor -- indicates that it is relatively flat and suitable for construction with minimal changes to the contour of the land. Morton also presents further computations of the proposed coverage contours taking into account the observed terrain, which indicate that the contours will not vary significantly from those previously calculated (based on an engineering model assuming flat terrain) and that there will be no prohibited interference with other stations. Morton asserts that there is no basis for Alegria's claim that use of the site would result in excessive runoff of silt and that Heritage is prepared to take all necessary measures to protect the site.

20. With this in mind, Heritage maintained that, before it obtained its alternative site, it always had had reasonable assurance that it could purchase the Soelands' property for $325,000 and thus had had no reason to report that the site was unavailable. Heritage argued that its search for an alternative site was occasioned by the involuntary and unforeseeable circumstance that the Soelands' refused to abide by the terms of the purchase option and that thereafter Heritage diligently secured an alternative site. Heritage urged that, although it has not yet entered into a lease with the city, it has a firm understanding sufficient to establish reasonable assurance. Moreover, in Heritage's view, because its site is suitable and available, the Commission's acceptance of the amendment will not require further hearings and will not disrupt the proceeding. Heritage argued that if the Commission finds it qualified with respect to its transmitter site, this would not constitute unfair prejudice to Alegria. Thus, Heritage contended that it has shown good cause for the Commission to accept the amendment. The Mass Media Bureau agreed with Heritage that there are no technical objections to the new site. The Bureau took no position on the good-cause question.

21. We agree with Heritage that Alegria's claims are groundless. Preliminarily, we deny Alegria's motion to strike Heritage's reply. Consideration of the reply does not unfairly prejudice Alegria and failure to consider it would deprive Heritage of a fair opportunity to respond to Alegria's objections to its proposal.

22. As to the merits, Duree's statement establishes that Heritage had reasonable assurance that it could acquire the Soelands' property, despite the apparent indication of the September 3, 1987 letter that the property was no longer available. Because Heritage has demonstrated, based on Duree's first-hand knowledge, that the September 3 letter cannot be taken at face value, this case differs from those such as *Valley FM Radio*, 93 FCC 2d 1330 (Rev. Bd. 1983), in which a site owner's written denial of permission to use a site was dispositive. It thus appears that Heritage had reasonable assurance of acquiring the Soelands' site until November 12, 1987 and had no reason to report its unavailability before that date.

23. We also agree with Heritage that it secured reasonable assurance for the Lake Hennessey site by October 20, 1987. The Commission does not require an applicant to establish that it has a binding arrangement or legal control of the site; an oral promise by the landowner to sell or lease land is sufficient. *Louis Vander Plate*, 13 FCC 2d 952, 957-58 ¶ 16 (1968). The assurances that Heritage obtained from the City of Napa and its officials are at least comparable to those that we approved in *Teton Broadcasting Ltd. Partnership*, 1 FCC Rcd 518, 519 ¶ 9 (1986). *See also Millard V. Oakley*, 42 RR 2d 1495, 1498-99 ¶¶ 8-9 (1978). Heritage's contacts with city officials go far beyond the vague discussions criticized in cases such as *Progressive Communications, Inc.*, 61 RR 2d 560, 562-63 ¶¶ 4-5 (Rev. Bd. 1986). This being the case, we find that Heritage acted diligently in securing a new site when it realized that difficulties existed in dealing with the Soelands. This case is therefore readily distinguishable from cases such as *Midwest St. Louis, Inc.*, 79 FCC 2d 519, 533-34 ¶ 32 (1980), where an applicant failed to take diligent measures to secure an alternative site for months after unequivocally learning that its proposed site was unavailable.

24. Because Heritage could have continued to deal with the Soelands, its amendment is not strictly involuntary or necessitated by unforeseen circumstances. However, as Heritage points out, the issue of voluntariness is not germane where an amendment removes a disqualifying defect and confers no comparative advantage. *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488-89 ¶ 16 (1981). Moreover, it would be unreasonable to construe the voluntariness and foreseeability requirements so literally. We did not do so in *California Broadcasting Corp.* 90 FCC 2d 800, 809 ¶ 18 (1982), where we treated the creation of a national park as an unforeseeable circumstance necessitating an amendment to a new site, although the applicant could have continued to prosecute its original proposal (and litigate an environmental issue) despite the creation of the park.

25. Alegria gives us no basis to reject Heritage's claims of site suitability. Unlike Heritage, Alegria does not support its unsuitability arguments with any evidence based on an inspection of the site's condition. Nor does Alegria supply any detailed computations -- to counter those of Heritage -- substantiating its claims that coverage of a station operating from Heritage's proposed site would be problematical. Moreover, the Bureau has examined Heritage's showing and interposes no objections to Heritage's new site. Hence, we have no reason to doubt the validity of Heritage's engineering showing. Similarly, Heritage has provided assurances -- based on its first hand inspection of the site -- sufficient to rebut Alegria's arguments about environmental problems. Finally, because we can find Heritage qualified as to site availability without any disruption of the proceeding, acceptance of the amendment does not unfairly prejudice Alegria. *See Simon Geller*, 90 FCC 2d 250, 259 ¶ 19 (1982), recon. denied, 91 FCC 2d 1253 (1982), remanded on other grounds sub nom. *Committee for Community Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984).

III. ORDERING CLAUSES

26. ACCORDINGLY, IT IS ORDERED, That the Motion to Strike, filed May 8, 1987, by Heritage Communications IS DENIED.

27. IT IS FURTHER ORDERED, That the Application of Alegria I, Inc. for Review of Review Board Decision and the Application of Alegria I, Inc. for Review of Hearing Designation Order, filed April 23, 1987 ARE DENIED.

28. IT IS FURTHER ORDERED, That the Motion for Leave to File Reply to Opposition to Petition for Leave to Amend filed December 18, 1987 by Heritage Communications IS GRANTED and the Motion to Strike filed January 7, 1988 by Alegria I, Inc. IS DENIED.

29. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed November 16, 1987 by Heritage Communications IS GRANTED and the associated amendment IS ACCEPTED.

30. IT IS FURTHER ORDERED, That the Petition to Reopen the Record and to Enlarge Issues filed October 27, 1987 IS DENIED.

31. IT IS FURTHER ORDERED, That the application of Heritage Communications for a construction permit (File No. BP-811015AK) IS GRANTED and the application of Alegria I, Inc. (File No. BP-811015AJ) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-6

In the Matter of:

Amendment of Part 73
to Authorize the use of
Multiple Synchronous
Transmitters by AM
Broadcast Stations

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 1988; Released: January 13, 1989

By the Commission:

INTRODUCTION

1. On January 15, 1987, the Commission adopted a *Notice of Inquiry* (*Inquiry*) in the above-entitled matter, to solicit information relevant to the development of appropriate technical standards for the operation of synchronous AM transmitters.[1] Having carefully considered the comments filed in response to the *Inquiry*, the Commission concludes that current transmitter synchronization technology does not warrant continuing this proceeding to the rule making stage at this time.

BACKGROUND

2. Synchronous broadcasting involves the use of two or more transmitters that broadcast identical program material on the same frequency. Such transmitters are generally located in geographic proximity to each other and are used to enhance or extend the coverage of an AM station. Since the service areas of the individual transmitters may overlap to some extent, mutual interference must be minimized by precisely matching (or synchronizing) the carrier frequency or phase between the stations.

3. The *Inquiry* noted that conventional methods of enhancing or extending AM station service areas (*e.g.*, increasing transmitter power, changing a directional antenna pattern, relocating the station, or some combination of these) were often precluded because of current congestion in the AM service and the difficulty in protecting the signals of other stations. The use of supplemental, carefully placed, synchronous transmitters appeared to offer an effective and economical way of improving service to important geographic areas that were poorly served by conventional AM stations, without causing significant interference to other stations. Examples cited included improving the service in communities receiving inferior signals because of anomalous propagation conditions within an AM station's normally predicted coverage area, extending the service area to include communities unable to support their own stations, and providing "ribbons of service" along major highways.

4. We recognized, however, that the use of synchronous AM transmitters posed a number of complex technical and administrative questions. These included the need for appropriate intra-system interference criteria (*i.e.*, among the stations in a particular synchronous network), inter-system interference criteria (*i.e.*, among transmitters in the synchronous network and other co-channel and adjacent channel stations) and various licensing and eligibility requirements. For example, we noted that successful use of synchronous transmitters depends fundamentally on the ability to control the interference that can occur among the stations in the synchronized network.[2] A seemingly minor change in the carrier frequency of one transmitter can cause periodic signal fading and distortion in areas where its signal and the signal of another transmitter on the same frequency are of comparable amplitude. Even where exact phase relationships are maintained between stations, we observed that zones of interference could occur where the signals of the individual stations arrive substantially out of phase with each due to their geographic placement with respect to the point of reception. Accordingly, we noted the importance of designing synchronous systems so that areas of interference occur in largely unpopulated areas if at all possible. Comment was sought on the relative merits of frequency and phase synchronization and on whether there was any significant advantage of one technique over the other. [3]

5. Another intra-system interference consideration discussed in the *Inquiry* was necessary desired-to-undesired (D/U) signal ratios for synchronous transmitters. The traditional D/U ratios for AM stations are set forth in Section 73.37(b) of the Commission's Rules. However, the D/U ratios for synchronous transmitters may vary as a function of transmitter frequency tolerance, transit time (the time required for the signal to reach the receiver from each transmitter location), signal type (groundwave or skywave), the requirements of stereophonic transmission, and the effects of audio processing techniques. As a result, merely maintaining a calculated phase relationship among the carrier frequencies of transmitters in a synchronous network may not produce desired results. The phase relationships of the modulating signals applied to the various transmitters may also need to be controlled. Thus, comment was sought on the effects of transit time and the manner in which program distribution equalization (the delay applied to the various modulating signals necessary to achieve the desired phase relationships) could be employed to minimize its effects.

6. We also requested comment on the most appropriate method for calculating the interference effects of multiple synchronous transmitters. The *Inquiry* encouraged testing to determine the effects of two as compared to three or more synchronous transmitters. Mention was also made of the fact that in the United States, the power of synchronous transmitters is typically rather low in comparison to main transmitter power, but that in Europe this is not necessarily the case. Accordingly, we also requested comment on appropriate power limitations for synchronous transmitters.

7. We also solicited comment on various inter-system interference considerations and, in doing so, indicated that the traditional D/U ratios contained in Section 73.37(a) appeared appropriate as groundwave interference protection criteria, but we sought comment on whether transmitters in a synchronous network should be considered individually or collectively in determining interfer-

ence to and from other stations. Comment was also requested on the relevance of the 50% exclusion rule to computing the interference effects of synchronous transmitters.[4]

8. In addition to the preceding technical issues, we discussed potential licensing and eligibility requirements (*e.g.*, what criteria should determine whether or not synchronous transmitters should be authorized). We also questioned whether the mere desire to increase service area constituted sufficient justification, or whether synchronous transmitters should be authorized only in areas where conventional AM stations were precluded because of interference constraints. Comment was also requested on whether or not limits should be placed on the extent to which coverage could be augmented, and if synchronous operation should be permitted only in those areas within a station's normally protected contour.

9. Additionally, we sought comment on whether synchronous transmitters should be authorized only to the original "parent" AM station licensee, whether the authorization of synchronous transmitters as either a major or minor change to an AM facility application and on what circumstances should render such applications major or minor in character. Lastly, comment was requested on whether synchronous transmitters should be counted for purposes of determining compliance with the multiple ownership "rule of twelve" and whether local ownership "duopoly" rules should be applied. The tentative conclusion proposed was that they should not be considered as additional stations in either case.[5] Nevertheless, comment was sought on whether the public would be served by providing exceptions to these rules.

SUMMARY OF COMMENTS

10. In response to the *Inquiry*, we received twenty-two comments and one reply comment.[6] While many of these comments expressed optimism over the potential benefits of synchronous transmitters, others enumerated a variety of technical and operational difficulties.

11. The comments of Price Communications Corporation (Price), licensee of Station KKOB, Albuquerque, New Mexico, were representative of both the benefits and difficulties associated with synchronous operation. Price observed that even in a perfectly (phase) synchronized system, severe receiver distortion occurred when vehicular receivers moved through areas where main and synchronous transmitter signal strengths were of sufficient amplitude to cause mutual interference. Price described what it calls the "Paradox of the Period", where interference between two closely (frequency) synchronized transmitters is acceptable for much of the time, except when the two transmitters eventually drift out of phase. Then, the null between the two signals can last for hours, resulting in considerable mutual interference.[7] Price concluded that the cost of achieving phase synchronization and program equalization distribution was high, and that the preferred alternative was to authorize nominally synchronized transmitters (i.e., those meeting the frequency stability tolerances applicable to non-synchronized transmitters) having substantially less power than the main transmitter. In such a case, Price noted that interference between transmitters may occur more frequently but would be subjectively less bothersome.

12. Greater Media, Inc. (Greater Media) also supported the proposal to allow general use of synchronous transmitters, although its opinion differed somewhat from that of Price. It concluded that based on domestic and European data, phase synchronization appeared to be superior to frequency synchronization as a general rule, although the latter may be appropriate for use in highly populated areas where receiver automatic gain control can compensate for the effects of differing signal strengths. Other commenters similarly affirmed the superiority of phase synchronization, but suggested that optional use of frequency synchronization be permitted in appropriate circumstances.

13. The issue of appropriate intra-system standard for synchronous operation was not well developed in the comments. Price urged that AM station licensees be given the freedom to determine the amount of interference between synchronized transmitters and the most appropriate means of controlling it. Advanced Broadcast Consultants, Inc. (ABC, Inc.) suggested that synchronous transmission facilities be designed to the same standards as the primary station, and therefore satisfy the protection ratios currently set forth in Section 73.37(a) of the Commission's Rules. Greater Media encouraged the Commission to adopt the European method of determining needed protection ratios which uses a statistical method based on subjective impressions of reception quality from transmitters in the synchronized group. However, no consensus on this matter was apparent.

14. Comments on the effects of frequency tolerance, transit time and other signal characteristics on intra-system signal protection ratios were expressed only in general terms. No specific relationships were identified or discussed. Experiences with program distribution equalization seemed encumbered with difficulties and inconclusive, and in several cases problems were discussed in achieving synchronization.

15. The matter of inter-system (or inter-station) interference criteria, however, received considerable comment. Generally, the parties recommended that synchronous transmitters be afforded protection similar to that provided the primary station, and that they should not extend the interference contour of the parent station. Thus, the use of the current daytime and nighttime signal strength prediction methods set forth in the rules was deemed appropriate. As a result, synchronous transmitters would be evaluated individually for their contribution to interfering signal components determined by the RSS method. There was a consensus that synchronous transmitters should be regarded simply as extensions of the primary transmitter, and as such, comply with all current regulations.

16. Agreement also was noted in the matter of the maximum output power appropriate for synchronous transmitters. No one disputed the general conclusion that the maximum power of a synchronous transmitter should not exceed the power of the primary station. ABC, Inc. suggested that a minimum power of 100 watts be required of synchronous transmitters and that the radiation efficiency of synchronous transmitter antenna systems meet a minimum efficiency standard of 241 mV/m/kW at 1.0 km. However, Tidewater Radio Show, Inc. (Tidewater) disputed this view, arguing that given the wide variety of situations in which synchronous transmitters could be employed to enhance service, a policy of no minimum power would be more consistent with the Commission's

policy in conferring post-sunset authority.[8] Tidewater believes that such a flexible approach would be more consistent with the Commission's objective in encouraging the use of synchronous broadcasting technology.

17. There was also a consensus among the commenters on the various licensing and eligibility issues raised in the *Inquiry*. All agreed that synchronous transmitters should be authorized only to the licensees of the primary station, that they should not be counted for purposes of determining compliance with multiple ownership regulations, and that application of "duopoly" restrictions would be inappropriate, since synchronous transmitters were logical extensions of the primary station.

18. The question was raised as to whether or not use of synchronous transmitters would constitute a major or minor change in facilities. Recommendations on this matter were based on the anticipated net effect of such operation, if an equivalent change were made by modifying the primary station facilities. Thus, if the intent was to better serve an area experiencing signal degradation within a station's normally predicted service contour, the use of a synchronous transmitter was regarded as only a minor change in station facilities. However, use of such transmitters to expand the normally predicted service area was considered a major change that should be subject to the normal major modification procedures, including public notice and cutoff provisions.[9]

19. In sum, the *Inquiry* appears to have been useful in soliciting direction on eligibility and authorization issues associated with the use of synchronous transmitters, but less successful in resolving some of the technical issues. This fact was noted by several of the commenters. The Association of Federal Communications Consulting Engineers (AFCCE) concluded that despite the availability of advanced circuitry and techniques said to be capable of providing a high degree of synchronization and delay equalization, recent results have been disappointing. AFCCE believed that the reports submitted by stations with experimental authorizations lack sufficient technical detail to permit reliable forecasts of the interference impact of synchronous transmitters on other licensees. As a result, AFCCE recommended that the inquiry stage of this matter be extended, that further experimental operation be conducted, and that the rule making stage be deferred until sufficient experience has been gained to permit the development of appropriate technical rules.

20. The opinion of NAB largely coincided with that of AFCCE. NAB concluded that while there have been positive elements in the reports submitted to the Commission by those licensees holding experimental authorizations, the record established to date does not demonstrate consistent success with current synchronization technology, and therefore, does not warrant proceeding to the rule making stage at this time.

21. The comments of the Association for Broadcast and Engineering Standards (ABES) are consistent with those of AFCCE and NAB; that is, that contemporary technology is not yet capable of designing a synchronous AM transmission system that is economically feasible and capable of reducing inherent technical problems to acceptable levels.[10]

DISCUSSION

22. After carefully considering the comments, the Commission concludes that while this proceeding has produced additional beneficial information concerning synchronous AM transmission, remaining technical uncertainties appear to preclude meaningful rule making activity at this time. The record indicates the use of a variety of different approaches to achieving transmitter synchronization, each with varying degrees of success. More importantly, no particular approach to synchronization emerged as being consistently efficacious, even in the absence of economic considerations. The record does mention several emerging technologies (*e. g.*, satellite and fiber optic links) that may provide an economical and effective means of achieving phase synchronization. However, none of these have yet been tested in conjunction with AM broadcast operation. Since the applicability of the various current and new technologies to the unresolved technical issues related to AM transmitter synchronization may take some years to determine, we believe the prudent course of action is to terminate this proceeding without action.

23. This action notwithstanding, we wish to express our commitment to cooperating with the broadcast industry in exploring ways of deriving the maximum possible benefits from transmitter synchronization technology. Accordingly, we will generally continue to authorize experimental authorizations to those AM station licensees who wish to investigate further the potential benefits of synchronous operation, and will revisit this matter when the circumstances appear appropriate.

24. Accordingly, IT IS ORDERED that MM Docket No. 87-6 IS TERMINATED.

25. This action is taken pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Parties filing comments in MM Docket No. 87-6:

Advanced Broadcast Consultants, Inc.

Association for Broadcast Engineering Standards

Association of Federal Communications Commission Consulting Engineers

Blue Hen Broadcasting, Inc.

Corporation for Public Broadcasting

Ethnic Radio of Los Banos, Inc.

First State Broadcasting, Inc.

FM Systems, Inc.

Greater Media, Inc.

Harris Corporation, Broadcast Products Division

Lookingglass Prairie Limited Partnership

National Association of Broadcasters
National Public Radio
Radio Carlsbad, Inc.
Radio Enterprises of Ohio, Inc.
SatLok Systems, Inc.
Southwest Radio Corporation
Texas Cost Broadcasters, Inc.
Tidewater Radio Show, Inc.
Tribune Broadcasting Company
Vir James, P.C.
WDUN Radio, Inc.

Reply comments:

Southwest Radio Corporation

FOOTNOTES

[1] *See, Notice of Inquiry*, MM Docket No. 87-6, 2 FCC Rcd 1389 (1987).

[2] The "network" is that group of individual transmitters operated collectively to distribute the service of the primary AM station.

[3] The terms "frequency synchronization" and "phase synchronization" refer to synchronization techniques that differ primarily in terms of degree of accuracy. Two transmitter carriers are considered to be frequency synchronized if their frequencies are within 0.1 Hz of each other. Thus, some drift within the 0.1 Hz tolerance would be considered acceptable. If the two carriers are phase synchronized, they would be exactly in phase with each other, or separated in phase by some fixed amount.

[4] The "50% exclusion rule" is contained in Section 73.182(l)(2) of the Commission's Rules. It indicates that the Root-Sum-Square (RSS) value of interfering signals will not be considered to be increased when a new interfering signal is added which is less than 50% of the RSS value of the interference from existing stations, provided that the new interfering signal is not stronger than any previous signal included in the RSS computation.

[5] *See* Section 73.3555 of the Commission's Rules which limits the multiple ownership of broadcast stations.

[6] Initially, comments filed in response to the *Inquiry* were due on May 4, 1987, with reply comments due on June 3, 1987. However, during the pendency of the proceeding, three petitions were received that sought additional time for comments and reply comments, on the basis that the proposed extension was necessary for additional testing of synchronous transmission systems. Ultimately, the comment and reply comment periods were extended to May 8, 1988 and June 8, 1988, respectively.

[7] This problem is characteristic of frequency synchronization that approaches phase synchronization in terms of accuracy. Desirable phase relationships are sustained for considerable periods of time, but adverse phase relationships also become more pronounced.

[8] In some cases, post-sunset operating authority limits the power to 2 or 3 watts.

[9] The National Association of Broadcasters (NAB) argued that while synchronous operation may be useful in providing enhanced service within a station's regular service contour or enable AM "daytimers" to provide service to a greater number of people without the interference consequences associated with additional transmitter output power, it should not be used to extend a station's service area.

[10] We would note that two of the commenters, SatLok Systems, Inc. (SatLok) and FM Systems, Inc. (with which SatLok is associated) describe a new satellite-based, phase-lock synchronization system said to provide accurate frequency or phase synchronous operation at a reasonable cost. However, this system has yet to be tested by AM stations.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY
Request for Waiver of Interim
Cost Allocation Manual and
Part 65 of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1988; Released: January 13, 1989

By the Chief, Common Carrier Bureau:

1. By letter dated October 3, 1988, American Telephone and Telegraph Company (AT&T) has requested an extension of the Common Carrier Bureau's waivers of the requirements of the Interim Cost Allocation Manual (ICAM) and Part 65 of the Commission's Rules, 47 C.F.R. Part 65, with respect to particular service offerings by AT&T.

2. The subject waivers were originally granted by Bureau Orders that permitted certain AT&T private line service offerings to become effective, subject to the condition that revenues and costs of these services be excluded from the ICAM private line category for purposes of applying the equalization requirement and measuring AT&T's compliance with applicable Part 65 rules.[1] This condition was imposed to permit the identification and separate regulatory consideration of these service offerings.[2]

3. As AT&T observes, the Commission has pending two inquiries respecting the policies governing regulation of services provided by dominant carriers. *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 2 FCC Rcd 5208 (1987); Decreased Regulation of Certain Basic Telecommunications Services, CC Docket No. 86-421, 2 FCC Rcd 645 (1987).

4. These proceedings, depending on their resolution, could have significant consequences for the regulatory treatment of the cited AT&T offerings. In any case, apart from the prospect of broad regulatory changes, the particular concerns raised by these offerings remain significant. Until the concerns that led to separate accounting requirements for these services are resolved, either in the context of the tariff proceedings or in the context of the more general inquiries, AT&T should continue to comply with the separate accounting and reporting requirements established for these services.

5. Accordingly, IT IS ORDERED that this Bureau's waiver of requirements of the Interim Cost Allocation Manual and of Part 65 of the Commission's Rules, 47 C.F.R. Part 65, to the extent necessary to comply with separate accounting instructions for the services listed in notes 1 and 2, *supra*, IS EXTENDED until December 31, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] American Telephone and Telegraph Company, Transmittal No. 474, Memorandum Opinion and Order, Mimeo No. 3264, released Mar. 25, 1986 (ACCUNET - Packet Service); American Telegraph and Telephone Company, Transmittal No. 415, Memorandum Opinion and Order, Mimeo No. 3501, released Apr. 3, 1986 (Defense Commercial Telecommunications Network); American Telephone and Telegraph Company, Transmittal No. 581, Memorandum Opinion and Order, Mimeo No. 4620, released May 20, 1986 (SKYNET Ku-Band).

[2] Since the Bureau's prior extension of these waivers, 3 FCC Rcd 1063 (1988), several additional AT&T offerings have become effective subject to the requirement that associated revenues and expenses similarly be held separate. American Telephone and Telegraph Company, Transmittal Nos. 895 and 961, Memorandum Opinion and Order, 2 FCC Rcd 5493 (1987) (Digital Tandem Switching Arrangement); American Telephone and Telegraph Company, Transmittal Nos. 1018 and 1102, 3 FCC Rcd 995 (1988) (Virtual Telecommunications Network Service, Option I); American Telephone and Telegraph Company, Transmittal No. 1145, Memorandum Opinion and Order, DA 88-632, released Apr. 28, 1988 (Virtual Telecommunications Network Service, Option II); American Telephone and Telegraph Company, Transmittal Nos. 1336 and 1349, Memorandum Opinion and Order, CC Docket No. 87-568, DA 88-1714, released Oct. 28, 1988 (Virtual Telecommunications Network Service, Option III). The instant action extends the scope of this waiver to these services.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-107

In the Matter of

RADIO NORTHWEST
BROADCASTING
COMPANY

Licensee of Radio Station
KKZU(AM)
Mountlake Terrace,
Washington

Order to Show Cause Why the
License of Station KKZU(AM),
Mountlake Terrace, Washington
Should Not Be Revoked

ORDER OF REVOCATION

Adopted: December 6, 1988; Released: January 13, 1989

By the Commission:

1. This proceeding began on March 16, 1988, when the Commission released its *Order to Show Cause and Notice of Apparent Liability*, 3 FCC Rcd 1597 (1988) (*Order to Show Cause)*. The Commission ordered Radio Northwest Broadcasting Company (hereinafter Radio Northwest or licensee) to show cause why its license for KKZU(AM) should not be revoked.[1] The Commission specified an issue: "To determine whether Radio Northwest Broadcasting Company violated Section 73.1740(a)(4) and/or 73.1750 of the Commission's Rules."[2] The Commission also specified an issue to determine in light of the evidence adduced whether Radio Northwest possesses the requisite qualifications to remain a Commission licensee. Radio Northwest has failed to respond to the Commission's *Order to Show Cause* and, thus, pursuant to Section 1.92(a) of the Commission's Rules has waived its right to a hearing. Accordingly, by *Order* released June 6, 1988, FCC 88M-1743, Administrative Law Judge Joseph Stirmer terminated this proceeding and certified this matter to the Commission for disposition pursuant to Section 1.92(c) of the Commission's Rules.

2. This revocation is based upon the following uncontested facts. On January 16, 1985, the licensee notified the Commission that, as of that date, station KKZU(AM) was off-the-air due to financial problems. This notification was followed by letter dated February 11, 1985, in which Radio Northwest requested permission to remain silent for a period of ninety days. Subsequently, the licensee sought, and received, several extensions of its silent authority. Its authority to remain off-the-air, however, expired on August 15, 1986. A March 1987 inspection of the station's facilities by personnel from the Commission's Seattle, Washington field office revealed that the facilities of KKZU(AM) are vacant and that the station remains silent. By letter dated April 13, 1987, the Commission directed Radio Northwest to provide specific plans for the return to operation of KKZU(AM). The licensee indicated that it was attempting to find a buyer for the station. Neither an application for assignment of license nor an application for transfer of control of the licensee has been filed with the Commission.

3. The licensee was ordered to file a written notice of appearance within thirty days of receipt of the *Order to Show Cause* in order to avail itself of the opportunity to be heard pursuant to Section 1.91(c) of the Commission's Rules. Radio Northwest has not filed a notice of appearance, and such failure, alone, constitutes a waiver of the licensee's right to a hearing pursuant to Section 1.92(a)(1) of the Commission's Rules.

4. On April 27, 1988, the Mass Media Bureau filed a Request for Admission of Facts. Return receipt indicates that it was served on a principal of the licensee. The licensee did not answer the request. Accordingly, all matters of which an admission was requested are deemed admitted, pursuant to Section 1.246(b) of the Commission's Rules. By *Order* released May 23, 1988, FCC 88M-1527, Administrative Law Judge Joseph Stirmer, as Presiding Judge, cancelled the prehearing conference scheduled for May 24, 1988, as well as the hearing in this proceeding. The *Order* indicated that, on May 19, 1988, the licensee advised Judge Stirmer that it would not appear at the prehearing conference and that it intended to surrender its license for cancellation. By letter dated May 20, 1988, the licensee advised Judge Stirmer that "it will not oppose the action of the FCC to revoke the license of KKZU" and that the letter should serve "as a waiver of a hearing in this matter." By telephone conversation on May 19, 1988, confirmed by his letter dated May 20, 1988, Richard Cole, secretary of the licensee corporation, advised counsel for the Mass Media Bureau in this proceeding that he was unable to locate "a license issued after the renewal in 1982," but that "KKZU would not oppose the revocation of its broadcast license."

5. It is clear from the record in this proceeding that KKZU(AM) ceased operation in January 1985 and has not returned to operation since then. Its authority to remain silent expired on August 15, 1986. Radio Northwest has declined to participate in the instant proceeding and has indicated its intention, in writing, to waive any right to contest the revocation of its license.

6. In view of the foregoing, it is concluded that Radio Northwest has violated the provisions of Sections 73.1740(a)(4) and 73.1750 of the Commission's Rules. Accordingly, the Commission ORDERS that the license of station KKZU(AM), Mountlake Terrace, Washington, IS REVOKED, effective immediately. This action is taken pursuant to the authority contained in Sections 312(a)(3), (a)(4) and (c) of the Communications Act of 1934, as amended. [3]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Although the Commission's *Order to Show Cause* included a *Notice of Apparent Liability* for willful or repeated violations of Commission rules, because of the action taken herein, no forfeiture is being imposed.

[2] Section 73.1740(a)(4) provides:

> (4) In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. no later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

Section 73.1750 provides:

> The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation.

[3] Section 1.92(a) of the Commission's Rules provides for the Presiding Judge's certification to the Commission of a revocation proceeding when the licensee has waived its right to a hearing. The Commission thereafter determines whether an Order of Revocation should issue. Henceforth, when the Presiding Judge makes the required Section 1.92(a) finding and issues a certification order, the Chief, Mass Media Bureau, will issue Orders of Revocation by delegated authority.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

tvUSA/PUEBLO, LTD. File No. BAPCT-880226KH
(Assignor)

and

SANGRE DE CRISTO
COMMUNICATIONS, INC.
(Assignee)

For Assignment of Construction Permit
for Television Station KPCS,
Channel 32, Pueblo, Colorado

SANGRE DE CRISTO File No. BMPCT-880705KF
COMMUNICATIONS, INC.

For Minor Modification of Construction
Permit for Television Station KPCS,
Channel 32, Pueblo, Colorado

MEMORANDUM OPINION AND ORDER

Adopted: December 30, 1988; Released: January 13, 1989

By the Chief, Mass Media Bureau:

1. The Chief, Mass Media Bureau, acting pursuant to delegated authority, has before him for consideration: (a) the above-noted application assigning the construction permit for unbuilt television station KPCS, Channel 32, Pueblo, Colorado, from tvUSA/Pueblo, Ltd. to Sangre de Cristo Communications, Inc. (Sangre);[1] (b) an application to modify the construction permit of station KPCS filed by Sangre; (c) a petition to deny the assignment application filed by KKTV, Inc., licensee of television station KKTV (CBS, Channel 11), Colorado Springs, Colorado (KKTV); (d) a petition to deny the assignment application filed by Pikes Peak Broadcasting Company, licensee of television station KRDO-TV (ABC, Channel 13), Colorado Springs, Colorado (Pikes Peak); and (e) responsive pleadings.[2]

BACKGROUND

2. The proposed acquisition of KCPS will result in the Grade B contour of that station being encompassed by the Grade B contour of Sangre's television station, KOAA-TV. Because Section 73.3555(a)(3) of the Commission's Rules prohibits any overlap of the Grade B contours of commonly owned stations, this acquisition would ordinarily be barred. Sangre, however, requests grant of the application, pursuant to Note 5 to the rule, based upon its representation that it will operate the station as a 100-percent satellite of KOAA-TV. Note 5 provides that Section 73.3555(a)(3) "will not be applied to cases involving television stations which are primarily satellite' operations" and that "such cases will be considered on a case-by-case basis in order to determine whether common ownership, operation or control of the stations in question would be in the public interest."

3. In support of its request, Sangre states that KOAA-TV cannot reach a substantial and growing number of viewers in Colorado Springs, the largest community in its market, because the mountainous terrain of the area creates shadowing in significant parts of the city and its suburbs. While it has not identified the number of viewers who receive either no signal or an inferior signal, Sangre asserts that 32 percent of the Colorado Springs' area, affecting 27.4 percent of the area's population, suffers from shadowing. Sangre also points out that its competitors have acknowledged this fact in their promotional material given to prospective advertisers in the Colorado Springs area. In an attempt to remedy this situation, Sangre asserts that it has considered moving KOAA-TV's transmitter site to Cheyenne Mountain, which is closer to Colorado Springs, but that the Commission's minimum spacing requirements prohibit the relocation.[3] It contends that operation of KPCS as a satellite would overcome these obstacles and would permit KOAA-TV to reach the entire market it would serve in the absence of rough terrain. Currently, Sangre states that it relies on K30AA, a 1000 watt UHF translator, licensed to serve Colorado Springs, to overcome some of the terrain shielding. According to Sangre, the restrictions on a translator's power, however, limit the effectiveness of this operation as a solution. Sangre further maintains that, since translators operate as secondary service,[4] as opposed to satellites, they are subject to future displacement. Even if additional translators were generally available, notwithstanding the limited restrictions regarding the filing of applications for translator stations,[5] there is no guarantee that they would be available to Sangre, since licensing of these stations could be subject to a lottery. Thus, Sangre believes that operating KPCS as a satellite provides the best solution for its coverage problems.

4. Sangre further contends that utilization of KPCS as a satellite would not adversely affect competition or diversity in the Colorado Springs-Pueblo market, which is served by five full-service television stations, eight low power television stations, 29 AM and FM radio stations, two independent daily newspapers, two weekly newspapers, and three independently owned cable television systems. In addition, since KPCS has yet to commence operation, Sangre asserts that its proposed satellite operation would not cause any loss of existing service in the market. Nor does Sangre believe that operating KPCS as a satellite would give it any unfair competitive advantage because KPCS' service area would be entirely encompassed by KOAA-TV. Moreover, Sangre states that its proposed satellite operation would not preclude entry of other television competitors into the market. According to Sangre, at least six new television stations can be authorized in the Colorado Springs-Pueblo market. Sangre believes, however, that the market will not support another full-service television station and bases its conclusion on the facts that KPCS has yet to be built and operated and that the permit for former station KCEC-TV, Channel 26, Pueblo, has been returned to the Commission and cancelled.

5. While acknowledging that its proposed satellite operation is different from most conventional satellite proposals,[6] Sangre argues that its operation of KPCS as a satellite would not be an inefficient use of spectrum, and is distinguishable from *Coral Television Corp.*, 80 FCC2d 323 (1980), *recon. denied*, 84 FCC2d 438 (1981) (*Coral*), where the Commission denied an application filed by WCIX-TV for a satellite authorization to be located 15 miles north of Miami, Florida, but within WCIX-TV's Grade B contour. WCIX-TV is licensed to Miami, Florida. At the time WCIX-TV filed its application, there was a mutually exclusive application pending for the authorization, and the applicant proposed a full-service operation. Thus, WCIX-TV's application was dismissed because it was contrary to the Commission's longstanding policy of favoring new and diverse voices in the community. By contrast, Sangre contends that the construction permit for KPCS will expire unless Sangre is allowed to acquire it and operate it as a satellite.[7] Sangre thus concludes that the public interest mandates approval of its proposal, since it would permit KOAA-TV to reach areas in its market for the first time, and since it would facilitate competition in the market "by making more comparable the service capabilities of the market's commercial VHF stations."

6. Subsequent to the filing of the assignment application, Sangre filed, as noted above, a contingent application for minor modification of the construction permit for television station KPCS. In the application, Sangre requests waiver of Section 73.685(a) of the Commission's Rules to permit KPCS' signal to be directed toward Colorado Springs in a manner that would preclude providing city grade service to Pueblo, its city of license. This, Sangre contends, would allow KPCS to carry out the specific objectives of its proposed satellite operation by directing the station's coverage to those areas of Colorado Springs that are shadowed from KOAA-TV's transmitter site, and by eliminating the need to extend KOAA-TV's service area beyond its present scope. Sangre is of the opinion that the requirement of Section 73.685(a) is not a bar to the grant of its assignment application, since it is willing to operate KPCS with a city grade signal over Pueblo, if required by the Commission. It believes, however, that there is no public interest need to provide city grade coverage to Pueblo in light of the fact that KOAA-TV, whose programming KPCS will duplicate, already provides such service to Pueblo.

PETITIONS TO DENY

7. In opposing Sangre's application to acquire and operate KPCS as a satellite, the petitioners generally state that the proposed operation would be an inefficient use of spectrum and would be inconsistent with the Commission's multiple ownership rules because it would preclude the introduction of a new television service with a diverse voice. In that regard, the petitioners assert that Sangre has presented no facts, other than vague inferences, to support its conclusion that many viewers in Colorado Springs are receiving inferior service as a result of the terrain shadowing of KOAA-TV's signal. The petitioners also point out that Sangre has provided no information as to the quality of service that translator television station K30AA provides in its attempt to remedy the alleged shadowing of KOAA-TV's signal in the Colorado Springs area. Relying on Arbitron market ratings for February of 1988, the petitioners note that, of the three off-the-air network affiliated television stations serving the Colorado Springs-Pueblo market, Sangre's station's ratings are consistently competitive with or better than the others, whether the ratings apply to Colorado Springs, alone, or to the entire Colorado Springs-Pueblo area of dominant influence. In that regard, the petitioner's aver that Sangre has not shown that KOAA-TV is suffering financial losses and is in need of a satellite to provide financial viability. Furthermore, since television stations are licensed to specific communities, the petitioners contend that satellite operations are not warranted just because a station happens to operate in a hyphenated market. Moreover, in view of the apparent growth in the market, and Colorado Springs in particular, they maintain that there is no economic justification for a satellite operation.

8. Conversely, the petitioners argue that, if Sangre's satellite proposal is approved, there would be nothing to prevent Sangre from originating local programming over KPCS in the future or from substantially increasing the station's power. They also aver that a satellite operation would create an imbalance in competition among the television stations in the market. Finally, the petitioners disagree with Sangre's characterization of the *Coral* case and they contend that *Coral* is fully applicable to the present case. Therefore, based on all of their arguments, the petitioners conclude that Sangre's proposed operation of KPCS as a satellite should be denied.

DISCUSSION

9. By its request to operate KPCS as a 100-percent satellite, Sangre is seeking shadow-free coverage of the Colorado Springs-Pueblo television market, although its station, KOAA-TV, is licensed to Pueblo. The Grade B contour of KPCS would be totally encompassed by that of KOAA-TV. While it has demonstrated that KOAA-TV's signal is shadowed in portions of Colorado Springs, a fact not refuted by the above-noted petitioners, it has not shown how many persons or television households would receive improved service or first time service if its proposed satellite operation of KPCS is approved. Nor does Sangre deny that its competitors, who are licensed to Colorado Springs, are subject to some shadowing as a result of the same mountainous terrain about which Sangre complains. Further, Sangre freely admits that its request is not based on the usual reasons given for seeking a satellite, but, rather, is based on its desire to have its 24-hour programming received by a growing number of viewers in Colorado Springs.

10. In *Coral*, above, the Commission denied a satellite request, which is very similar to Sangre's. The only distinctions are that in *Coral* there was a competing applicant for the facility and that the Florida terrain is relatively flat. In *Coral*, WCIX-TV, licensed to Miami, Florida, served the north Miami area with the use of translators. In that case, as here, WCIX-TV's satellite proposal required the licensing to the same entity of two full-service commercial television stations in the same city, and a request to limit the Grade B coverage of the proposed satellite to an area a translator would serve. It was also argued in *Coral* that the satellite operation should be considered tantamount to a very high power translator and that, if the use of a translator did not offend the Commission, use of a satellite should not be a problem, particularly when its coverage area would be

nearly identical to that of a translator. The Commission stated in response that there were very important differences between the two, most notably, the translator can be displaced by a full-service television station, and its authorization to operate does not bar, in the future, the introduction of a diverse voice. In addition, the Commission noted that there would be nothing to prevent WCIX-TV from commencing local origination, in the future, over the proposed satellite station, and that the Commission could not refuse to allow a substantial increase in power of the proposed station in the future. The Commission stated that the multiple ownership rules have two purposes: to provide as many different sources of information as possible, and to promote competition. *Id.* at 325. In denying WCIX-TV's satellite request, the Commission concluded that neither of these purposes would be served.

11. In the case before us, even though there is no competing applicant, we still find little support for Sangre's request. Sangre's station, KOAA-TV, although part of a hyphenated market, is licensed to Pueblo, and areas beyond are secondary to the service it is to provide to Pueblo. A grant would deprive the area of the potential for an increase in the number of voices in the market,[8] and would establish a means by which Sangre could control two separate, full-service television outlets serving the same city. Thus, Sangre proposes a significant departure from the rule, which, we believe, would require a compelling public interest showing. We find that such a showing has not been made.

12. Further, we believe that the showing submitted is substantially undermined by alternative means to provide the desired improved service, without the drawbacks outlined above; that is, by the use of one or more television translators or on-channel boosters. We understand that Sangre does not view the use of translators as desirable as a single full-service station. Nonetheless, one of the traditional reasons for the use of translators is to fill in shadowed areas due to rough terrain. *Low Power TV*, 102 FCC2d 295, 302 (1984). Under Commission procedures, filing windows are opened periodically, during which Sangre can file up to five translator construction permit applications.[9] Under our current procedures, a very high percentage of the applications are not mutually exclusive and can be granted, if they are otherwise consistent with Commission requirements. Even if mutually exclusive applications are filed, Sangre may win the lottery. If not, there is nothing to prohibit Sangre from buying a translator authorization or filing additional applications during a subsequent window. It is true that a translator can be displaced by a full-service station. In that regard, however, spectrum appears to be available and Sangre can select channels for its translators that are not likely to be displaced. Even where displacement occurs, we have adopted procedures to avoid the loss of an existing service wherever possible. *Low Power Television and Television Translator Service*, 2 F.C.C. Rcd. 1278 (1987), *reconsideration denied*, 3 FCC Rcd. 4470 (1988). Finally, if Sangre does not wish to await a filing window, and if the terrain is as severe as it posits, it can file applications for on-channel boosters. Such applications would not ordinarily be mutually exclusive with any other application and, once authorized, cannot be displaced. *FM and Television Booster Stations*, 2 FCC Rcd. 4625 (1987).

13. In view of the above, we find that Sangre has submitted no adequate reason in support of its request to grant its assignment application pursuant to the satellite exception in Note 5 of Section 73.3555 of the Commission's Rules. Accordingly, the above-noted applications are denied.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

FOOTNOTES

[1] Sangre is licensee of KOAA-TV (NBC, Channel 5), Pueblo, Colorado and K30AA, a UHF television translator, Colorado Springs, Colorado.

[2] Pueblo and Colorado Springs make up the hyphenated television market known as Colorado Springs-Pueblo, which is ranked as the 100th largest television market (Arbitron Television Markets and Rankings, 1986-1987). Since KKTV and Pikes Peak would compete with Sangre's proposed operation of KPCS, they have standing in this proceeding. *See F. C. C. v Sanders Bros. Radio*, 309 U.S. 470 (1940).

[3] Section 73.610(b) of the Commission's Rules requires that a mimimum of 189.5 miles separate cochannel VHF television stations located in Zone II. Operating from Cheyenne Mountain, KOAA-TV would be 26.8 miles short-spaced to KGWN-TV (Channel 5), Cheyenne, Wyoming.

[4] *See* Section 74.702(b) of the Commission's Rules.

[5] *Low Power TV*, 102 FCC2d 295 (1984).

[6] Sangre refers to "conventional" satellite cases such as *W. Russell Withers, Jr.*, 2 FCC Rcd 3460 (1987) (where satellite operation was authorized for a small market financially unable to support a full-service station); *Myers Broadcasting Co.*, 67 FCC2d 593 (1978), *aff'd sub nom., Dickinson Broadcasting Corp. v. F.C.C.*, 593 F.2d 1371 (D.C. Cir. 1979) (where the Commission authorized satellite operation in a community already served by a full-service station); and *Suburban Broadcasting Corp.*, 83 FCC2d 359 (1980) (where satellite operation was authorized in a large urban area served numerous full-service television stations).

[7] This is based on the affidavit of Edward B. Hanna, principal of tv/USA Pueblo, Ltd., in which he stated that attempts have been made to sell the construction permit and only Sangre has come forward after a previous attempt fell apart. In this connection it should be noted that an application (BMPCT-881012KF) for an extension of time to complete construction was filed on October 12, 1988.

[8] Sangre claims that there are a number of vacant television channels available for assignment in the Colorado Springs-Pueblo market, if other parties are interested in establishing a new station. On the basis of the record in this case, however, we are unable to conclude that the supply of assignable channels in this region exceeds the demand. Our freeze on the acceptance of applications for new television construction permits, including those in Colorado Springs-Pueblo market, explains the absence of applications in the area. Further, Sangre notes the growing number of residents in the area, so that applications to serve the growing population may be filed, if the freeze is lifted.

[9] There is no freeze on the filing of television translator applications similar to the freeze on full-service television applications.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-410

In the Matter of

Amendment of Section 73.202(b),	RM-5428
Table of Allotments,	RM-5469
FM Broadcast Stations.	*RM-5688*
(Columbia, *Eldon*, Centralia,	*RM-5792*
Mountain Grove and Cabool, Missouri)	

SECOND REPORT AND ORDER

Adopted: November 30, 1988; Released: January 12, 1989

By the Deputy Chief, Policy and Rules Division:

1. In a previously adopted *First Report and Order* in this proceeding 3 FCC Rcd 5734 (1988), we allotted FM Channel 230A to Columbia, Missouri, as that community's fifth commercial FM broadcast service, denied a counterproposal filed by the Clair Group to substitute Channel 230A for Channel 221A at Centralia, and deferred for later consideration a second counterproposal filed by Southwest Communications, Inc. (Southwest), licensee of Station KLDN(FM), Channel 224A, Eldon, Missouri, proposing to substitute Channel 224C2 for Channel 224A at Eldon, Missouri,[1] and to modify the license of Station KLDN(FM) to specify operation on the higher channel.

2. Southwest's proposal conflicts with Station KLRS, Channel 224A at Mountain Grove, and Station KVVC, Channel 292A at Cabool. In order to accommodate the proposed substitution at Eldon, in the *First Report and Order* we issued an Order to Show Cause to the licensees of Stations KLRS, and Station KVVC, directing them to demonstrate why their licenses should not be modified to specify operation on Channel 293A in lieu of Channel 224A at Mountain Grove and Channel 251A in lieu of Channel 292A at Cabool, respectively. In response to the Orders to Show Cause, Communication Works, Inc. (CWI), licensee of Station KRFI(FM),[2] Mountain Grove, Missouri, filed comments opposing the proposed change. KVVC Broadcasting, Inc., (KVVC) licensee of Station KVVC(FM), Cabool, Missouri, also filed opposing comments. CTC Communications, Inc. (CTC) filed reply comments.

3. In its comments, Southwest states that the effect of implementing its counterproposal is to maximize the potential for service to the public. Southwest claims that by upgrading to a Class C2 facility KLDN would enlarge the area it reaches by 476% and increase the population it serves by 376%. Southwest further states that it will apply to upgrade its facility, and that it will compensate KLRS and KVVC for the reasonable and prudent expenses those stations would incur in changing to Channel 293A and Channel 251A respectively.

4. CWI opposes the proposed change in frequency due to the potential loss of service to the listening public which KRFI(FM) serves. CWI alleges that service to Mountain Grove would be interrupted not only for the actual change of frequency, but for a following undetermined adjustment period, resulting in loss of community service by KRFI. CWI states that it offers no other objection to the proposal if technical and promotional costs associated with the involuntary channel change are reimbursed.

5. KVVC Broadcasting, Inc. (KVVC), licensee of KVVC(FM), Cabool, Missouri requests that the Commission deny Southwest's proposal to substitute Channel 251A for Channel 292A at Cabool. KVVC states that it is the only broadcast facility licensed to Cabool and that all nearby communities have licensed AM and FM outlets. KVVC further states that it is in the process of preparing an application for possible upgrade to Channel 293C2. KVVC states that it recently received approval from the FAA for a new tower site. KVVC notes that obtaining the grant from the FAA was both costly and time consuming. KVVC opposes Southwest's proposal to the extent that the allotment of Channel 251A to Cabool precludes any future upgrades for the community. KVVC argues that there is a possibility that Channel 292A can be upgraded to Channel 293C2. KVVC also states that the Mountain Grove station, KVVC's nearest competitor, will be relocated onto the channel that KVVC has occupied since it was built.

6. KVVC notes that while Southwest acknowledges its responsibility to compensate KVVC for the reasonable expenses incurred in changing to Channel 251A, no mention is made about compensating KVVC for the lost promotional value inflicted by the move. In light of KVVC's arguments regarding the potential adverse effects of the proposed substitutions, KVVC asks that the Commission finds that it has raised sufficient reasons to deny Southwest's request to substitute a less desirable channel at Cabool.

7. In reply comments CTC (Southwest) argues that the comments filed by KVVC and KRFI should be dismissed on procedural grounds. CTC states that the Commission in its *Order to Show Cause* stated that the licensees were to submit written statements by December 14, 1987. CTC notes that the *Order* specifically stated that the licensees must serve Southwest or its counsel with any comments which they had filed. CTC claims that neither KVVC or KRFI properly served their comments on petitioner. CTC states that KVVC's comments were mailed one week after the deadline and were not received by CTC's counsel until one day before the deadline for filing reply comments. On the other hand, CTC notes that KRFI never served its comments on petitioner.

8. CTC also asserts that the comments of KVVC and KRFI have no substantive merit. CTC contends that the essence of both of these comments is that if KVVC and KRFI change frequencies, listeners may be initially confused as to their location on the radio dial. CTC claims this excuse is insufficient to prevent the Commission from changing these FM channels. CTC points out that given the strong countervailing public interest, this is clearly an inadequate ground for denying Eldon, Missouri its first wide area FM service. Lastly, CTC argues that KVVC's statements concerning a potential upgrade is unsubstantiated and untimely. CTC contends that any argument along these lines should have been made during the ini-

tial comment period as a counterproposal to Southwest's request for a channel substitution. Regarding the licensee's proposed costs for making the switch, CTC states that it will not make any specific commitments concerning reimbursable expenditures until it has had the opportunity to review the facts of each case.

DISCUSSION

9. From the information submitted, we find that the public interest would be served by substituting Channel 224C2 for Channel 224A at Eldon, Missouri, since it could provide the community with its first wide area FM service.

10. Neither KVVC nor CWI has raised a reason for denial of the Eldon proposal in response to the Orders to Show Cause. Regarding CTC's procedural arguments, we find that KVVC's and KRFI's comments constitute ex parte presentations and are therefore procedurally flawed. Ex parte presentations in non-restricted proceedings such as this are any communications directed to the merits or outcome of a proceeding, which, if written, are not served on all parties to the proceeding. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. *See*, generally Sections 1.1201 and 1.1207 of the Commission's Rules.

11. CWI's failure to serve its comments on petitioner clearly constitutes an ex parte contact. No attempt to cure the deficiency was made by the party, therefore the comments will be dismissed accordingly. KVVC's failure to timely serve its comments on petitioner for almost two weeks in essence constituted an ex parte violation for that two week period that was arguably cured by subsequent late service. However, since we are proposing to modify the licenses of existing stations, we will discuss the concerns raised by the respondents since petitioner addressed the merits of the arguments.

12. KVVC is generally concerned about the impact the change in channels will have on its ability to serve its listeners and reimbursement of its expenses for changing to the new channel. CTC has stated that it will reimburse KVVC for the reasonable expenses involved in Station KVVC's change of channel. Reimbursement of costs (both technical and promotional) incurred by the affected station is governed by the guidelines set forth in *Circleville, Ohio*, 8 FCC 2d 159 (1976). However, should CTC and KVVC be unable to agree, they may seek further Commission assistance. *See Mayville and Wickliffe, Kentucky*, 48 RR 2d 1232 (1981). Moreover, in addition to promotional expenses, KVVC will be afforded a significant period of time between the release of a *Report and Order* modifying its license or permit and the actual change in its channel. This time, coupled with promotional efforts, will provide an additional safeguard with respect to any potential impact the change in channel will have on KVVC.

13. In essence, CWI raises the same concerns raised by KVVC about potential audience loss when its frequency is changed. These concerns have already been addressed above. In addition, CWI's argument that the proposed substitution would preclude any future upgrades of its station is untimely at best and may not be considered at this stage in the proceeding. We agree with petitioner that this proposal should have been submitted as a timely counterproposal in the instant proceeding. The upgrade proposal could then have been considered during the initial comment period on a comparative basis with Southwest's initial request for channel substitution.

14. Channel 224C2 can be allotted to Eldon in compliance with the Commission's minimum distance separation requirements at the current coordinates for Station KLDN(FM). [3] Channel 293A can be allotted to Mountain Grove, Missouri, in compliance with the Commission's minimum distance separation requirements and can be used at Station KRFI(FM)'s present transmitter site.[4] Channel 251A can be allotted to Cabool, Missouri, in compliance with the Commission's minimum distance separation requirements and can be used at Station KVVC(FM)'s present transmitter site.[5] As proposed, we shall also modify petitioner's license for Station KLDN(FM), Eldon, Missouri, to specify operation on Channel 224C2, modify KVVC Broadcasting, Inc.'s license for Station KVVC(FM), Cabool, Missouri, to specify operation on Channel 251A, and modify Communications Works, Inc.'s license for Station KRFI, Mountain Grove, Missouri, to specify operation on Channel 293A.

15. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **February 27, 1989**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

City	Channel No.
Cabool, Missouri	251A
Eldon, Missouri	224C2, 270A
Mountain Grove, Missouri	293A

16. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of CTC Communications, Inc. for Station KLDN(FM), Eldon, Missouri, IS MODIFIED to specify operation on Channel 224C2, in lieu of Channel 224A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

17. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of KVVC Broadcasting, Inc. for Station KVVC(FM), Cabool, Missouri, IS MODIFIED to specify operation on Channel 251A, in lieu of Channel 292A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in license BLH-7728, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH-7728, except for the channel as specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

18. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended that the license of Communications Works, Inc. for Station KRFI(FM), Mountain Grove, Missouri, IS MODIFIED to specify operation on Channel 293A, in lieu of Channel 224A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLH-7473, except the channel as specified above. Any other changes except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH-7473 except for the channel as specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

19. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Requested, to the following:

Tom L. Mason, President and General Manager
Radio Station KVVC(FM)
KVVC Broadcasting, Inc.
Box 514
Junction M and Business Route 60
Cabool, Missouri 65689

Larry D. Spence, President
Radio Station KRFI(FM)
Communication Works, Inc.
Route 4, Box 1360
Mountain Grove, Missouri 65711

Martin R. Leader
Ann K. Ford
John J. McVeigh
Fisher, Wayland, Cooper & Leader
1255-23rd Street, N.W., Suite 800
Washington, D.C. 20037
(Counsel for CTC Communications, Inc.)

20. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

21. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The license of KLDN(FM) was assigned from Southwest to CTC Communications on June 29, 1987.

[2] The call sign of KLRS has been changed to KRFI.

[3] The coordinates for Channel 224C2 at Eldon are 38-20-27 and 92-35-33.

[4] The coordinates for Channel 293A at Mountain Grove are 37-08-07 and 92-14-59.

[5] The coordinates for Channel 251A at Cabool are 37-07-58 and 92-08-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Annual 1989 Access
Tariff Filings

Petitions for Waiver and
Petition for Reconsideration

ERRATUM

Adopted: December 13, 1988; Released: December 14, 1988

By the Deputy Chief, Common Carrier Bureau:

1. In Attachment D to the Memorandum Opinion and Order in the above-entitled matter, released December 2, 1988, errors were made on the charts and in the appendices to the charts. The attached pages reflect the corrected charts and appendices. The pages are numbered as they were in Attachment D of that Order.

2. The specific changes appear in the attached pages. The changes are as follows:

(1) Enter "N/A" in revenue, tax, and return rows in the columns for Billing & Collection and Interexchange in chart COS-1(P), and in the column for Interstate in charts COS-1(P) and COS-1(P) Addendum, as depicted in the attached pages.

(2) Enter "N/A" in revenue requirement rows in the columns for annualized prospective data and implicit test period growth on page 6 of chart COS-2, as depicted in the attached pages.

(3) Enter "N/A" in revenue requirement rows in the columns for Other Interstate and Total Interstate in COS-4 as depicted in the attached pages.

(4) Change "COS-1(H)" to "COS-1(P)" in the descriptions of rows 250, 440, 550, and 740 on page 26 of the COS-APP.

(5) Change the descriptions of rows 145, 255, and 445 to reflect the correct formulas, and change a note reference on page 27 of the COS-APP.

(6) Insert aditional columns in RTE-3, page 1, to reflect rates which become effective January 1, 1989.

(7) Make editorial changes to pages 4 and 5 of the RTE-APP.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

,.LINE ENTITY:

COST ANALYSIS SUMMARY
(DOLLARS IN THOUSANDS)

Classifications	Calendar Year 1988 Total	Annualized 4/1/89 to 12/31/89 Test Period Total	Non-Reg	Other Adjust.	Subject To Separations	State	Interstate
	(A)	(B)	(C)	(D)	(E)-D-C-D	(F)	(G)
Revenues							
100 Network Access	N/A	N/A	N/A	N/A	N/A	N/A	N/A
110 Local Network	N/A	N/A	N/A	N/A	N/A	N/A	N/A
120 Toll Network	N/A	N/A	N/A	N/A	N/A	N/A	N/A
130 Miscellaneous	N/A	N/A	N/A	N/A	N/A	N/A	N/A
140 AFUDC	N/A	N/A	N/A	N/A	N/A	N/A	
150 Uncollectibles	N/A	N/A	N/A	N/A	N/A	N/A	N/A
170 Common Line Support	N/A	N/A	N/A	N/A	N/A	N/A	
171 Long Term	N/A	N/A	N/A	N/A	N/A	N/A	
172 Transitional	N/A	N/A	N/A	N/A	N/A	N/A	
175 Net Revenues	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Expenses							
180 Plant Specific							
190 Plant Non-specific Less Depr.							
200 Marketing							
210 Customer Operations Services							
220 Access							
230 Corporate Operations							
240 Extraordinary							
250 FCC Expense Adjustment							
260 Lifeline Adjustment							
270 Subtotal							
280 Depreciation/Amortization							
290 Total Expenses							
Other Taxes							
300 State And Local Income	N/A	N/A	N/A	N/A	N/A	N/A	N/A
310 Other State And Local							
320 Total Other Taxes	N/A	N/A	N/A	N/A	N/A	N/A	N/A
FIT							
330 Fixed Charges							
340 IRS Income Adjustment							
350 FCC Taxable Income Adjustment	N/A	N/A	N/A	N/A	N/A	N/A	
360 ITC Amortization							
370 FCC ITC Adjustment	N/A	N/A	N/A	N/A	N/A	N/A	
380 Net FIT	N/A	N/A	N/A	N/A	N/A	N/A	N/A

NOTE: Col A is Total Calendar Year for 1988, and is not annualized.

FILING ENTITY:

COST ANALYSIS SUMMARY
(DOLLARS IN THOUSANDS)

Classifications	Special Access (R)	Total Access (S)=L+Q+R	Billing & Collection (T)	IX (U)
Revenues				
100 Network Access			N/A	N/A
110 Local Network			N/A	N/A
120 Toll Network			N/A	N/A
130 Miscellaneous			N/A	N/A
140 AFUDC				
150 Uncollectibles			N/A	N/A
170 Common Line Support	N/A			
171 Long Term	N/A			
172 Transitional	N/A			
175 Net Revenues			N/A	N/A
Expenses				
180 Plant Specific				
190 Plant Non-specific Less Depr.				
200 Marketing				
210 Customer Operations Services				
220 Access				
230 Corporate Operations				
240 Extraordinary				
250 FCC Expense Adjustment				
260 Lifeline Adjustment				
270 Subtotal				
280 Depreciation/Amortization				
290 Total Expenses				
Other Taxes				
300 State And Local Income			N/A	N/A
310 Other State And Local				
320 Total Other Taxes			N/A	N/A
FIT				
330 Fixed Charges				
340 IAS Income Adjustment				
350 FCC Taxable Income Adjustment				
360 ITC Amortization				
370 FCC ITC Adjustment				
380 Net FIT			N/A	N/A

COST ANALYSIS SUMMARY
(DOLLARS IN THOUSANDS)

. .Classifications	Calendar Year 1989 Total	Annualized 4/1/89 to 12/31/89 Test Period Total	Non-Reg	Other Adjust.	Subject To Separations	State	Interstate
	(A)	(B)	(C)	(D)	(E)=B-C-D	(F)	(G)
Plant-in-service							
390 Support Plant							
400 COE-switching							
410 COE-transmission							
420 Cable And Wire							
430 Information							
440 Amortizable Assets							
450 Total Plant							
Other Investments							
460 Property Held For Future Use							
470 Plant Under Construction							
480 Plant (acquisition) Adjustment							
490 Other Deferred Charges							
500 Material And Supplies							
510 Cash Working Capital							
520 FCC Investment Adjustment							
530 Total Other Investments							
Reserves							
540 Depreciation							
550 Amortization							
560 Deferred FIT							
570 Customer Deposits							
580 FCC Reserve Adjustment							
590 Total Reserves							
Return Rate							
620 Average Net Investment							
630 Net Return	N/A	N/A	N/A	N/A	N/A	N/A	N/A
640 Rate Of Return	N/A	N/A	N/A	N/A	N/A	N/A	N/A
650 FCC Ordered Refund	N/A	N/A	N/A	N/A	N/A	N/A	N/A
660 Net Return Including FCC Refund	N/A	N/A	N/A	N/A	N/A	N/A	N/A
670 Rate Of Return (including Refund)	N/A	N/A	N/A	N/A	N/A	N/A	N/A
680 Universal Service Fund	N/A	N/A	N/A	N/A	N/A	N/A	
690 Lifeline Adjustment	N/A	N/A	N/A	N/A	N/A	N/A	

NOTE: Col A is Total Calendar Year for 1989, and is not annualized.

FILING ENTITY:

COST ANALYSIS SUMMARY
(DOLLARS IN THOUSANDS)

Classifications	Special Access	Total Access	Billing & Collection	IX
	(R)	(S)=L+Q+R	(T)	(U)
Plant-in-service				
380 Support Plant				
400 COE-switching				
410 COE-transmission				
420 Cable And Wire				
430 Information				
440 Amortizable Assets				
460 Total Plant				
Other Investments				
480 Property Held For Future Use				
470 Plant Under Construction				
480 Plant (acquisition) Adjustment				
490 Other Deferred Charges				
500 Material And Supplies				
510 Cash Working Capital				
520 FCC Investment Adjustment				
530 Total Other Investments				
Reserves				
540 Depreciation				
550 Amortization				
560 Deferred FIT				
570 Customer Deposits				
580 FCC Reserve Adjustment				
590 Total Reserves				
Return Data				
520 Average Net Investment				
530 Net Return			N/A	N/A
540 Rate Of Return			N/A	N/A
550 FCC Ordered Refund			N/A	N/A
560 Net Return Including FCC Refund			N/A	N/A
570 Rate Of Return (including Refund)			N/A	N/A
530 Universal Service Fund	N/A		N/A	N/A
600 Lifeline Adjustment	N/A		N/A	N/A

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FILING ENTITY:

ADDENDUM
COS-1(P)
page 1 of 3

COST ANALYSIS SUMMARY
(DOLLARS IN THOUSANDS)

Classifications	Calendar Year 1989 Total	Annualized 4/1/89 to 12/31/89 Test Period Total	Non-Reg	Other Adjust.	Subject To Separations	State	Interstate
	(A)	(B)	(C)	(D)	(E)=B-C-D	(F)	(G)
Revenues							
100 Network Access	N/A	N/A	N/A	N/A	N/A	N/A	N/A
110 Nonrecurring Charges excl ICBs	N/A	N/A	N/A	N/A	N/A	N/A	N/A
120 Recurring Charges excl ICBs	N/A	N/A	N/A	N/A	N/A	N/A	N/A
130 Individual Case Basis Rates	N/A	N/A	N/A	N/A	N/A	N/A	N/A

FILING ENTITY:

INTERSTATE
TIME SERIES COST DATA
(DOLLARS IN THOUSANDS)

	COST DATA	1988 1Q (I)	1988 2Q (J)	1988 3Q (K)	ANNUALIZED HISTORICAL PERIOD 1/88 - 9/88 (L)	ANNUALIZED PROSPECTIVE (TEST PER.) 4/89-12/89 (M)	IMPLICIT TEST PER GROWTH (N)
	REVENUE REQUIRE.						
600	Depree Exp						
610	Exp Less Depree						
620	Tax Less F.I.T.					N/A	N/A
630	Net Return					N/A	N/A
640	F.I.T.					N/A	N/A
660	Uncollect Rev & Inter During Const. & Other Rev. Adj.					N/A	N/A
680	Revenue Require					N/A	N/A
	RATE BASE						
670	Tel Plnt in Serv						
690	Rate Base Adj.						
690	Depree Reserve						
690	Accum Deferred Income Tax						
810	Net Rate Base						

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Filing Entity:

ANALYSIS OF ACCESS ELEMENT COST DATA

(DOLLARS IN THOUSANDS)

		COMMON LINE	TRAFFIC SENSITIVE		OTHER INTERSTATE	TOTAL INTERSTATE	TOTAL COMPANY (SUBJ TO SEPAR)
			SWITCHED	SPECIAL			
		(A)	(B)	(C)	(D)	(E)	(F)
	ANNUALIZED						
	TEST YEAR FORECAST						
	4/88 TO 12/88						
	REVENUE REQUIREMENT						
100	Depreciation				N/A	N/A	N/A
110	Expense Less Depreciation				N/A	N/A	N/A
120	Taxes Less F.I.T.				N/A	N/A	N/A
130	Net Return				N/A	N/A	N/A
140	F.I.T.				N/A	N/A	N/A
145	Uncoll. Rev.,I.B.C.& Other Rev. Adj.				N/A	N/A	N/A
150	Revenue Requirement				N/A	N/A	N/A
155	Access Service Revenues				N/A	N/A	N/A
	RATE BASE						
160	Telephone Plant In Service						
170	Rate Base Adjustments						
180	Depreciation Reserve						
190	Accum. Deferred Inc. Tax						
200	Net Rate Base						

NOTES:
(1) Actual Operating Statistics
(2) From 1986 TRP COS - 6
(3) From 1987 TRP COS - 6

COST ANALYSIS TABLE DESCRIPTIONS

COS-4 ANALYSIS OF ACCESS ELEMENT COST DATA

ROW	DESCRIPTION
	DEPRECIATION EXPENSE
100	SAME ACCOUNTS AS: COS-1(P), ROW 280
210	COS-1(H), ROW 280
400	COS-1(H), ROW 280
510, 700	FCC PART 31 ACCTS: 608, 609, 613 & 614
	EXPENSE LESS DEPRECIATION
110	SAME ACCOUNTS AS: COS-1(P), ROW 270
220	COS-1(H), ROW 270
410	COS-1(H), ROW 270
520, 710	FCC PART 31 ACCTS: 602 THRU 607, 610 THRU 612 621 THRU 635, 640, 642 THRU 650, 657, 658, 661 THRU 665; 668, 669, 671 THRU 677, 323, 365, 375 (NOTE 1) (NOTE 2)
	TAXES LESS F.I.T.
120	SAME ACCOUNTS AS: COS-1(P), ROW 320
230	COS-1(H), ROW 320
420	COS-1(H), ROW 320
530, 720	FCC PART 31 ACCTS: 307 STATE & LOCAL INC., PROPERTY, CAPITAL STOCK, SOCIAL SECURITY, GROSS RECEIPTS AND OTHER TAXES
	NET RETURN
130	THE RETURN ON AVERAGE NET INVESTMENT IS
240	CALCULATED AT THE AUTHORIZED RATE OF RETURN
430	FOR EACH OF THE ROWS
540	
730	
	FEDERAL INCOME TAX (FIT)
140	SAME DESCRIPT. AS: COS-1(P), ROW 380 (NOTE 3)
250	COS-1(P), ROW 380 (NOTE 3)
440	COS-1(P), ROW 380 (NOTE 3)
550	COS-1(P), ROW 380 (NOTE 3)
740	COS-1(P), ROW 380 (NOTE 3)

COST ANALYSIS TABLE DESCRIPTIONS

COS-4 ANALYSIS OF ACCESS ELEMENT COST DATA

UNCOLLECTIBLE & MISCELLANEOUS REVENUES AND INTEREST DURING CONSTRUCTION (AFUDC) (NOTE 4)

SAME ACCOUNT AS:

145 COS-1(P) ROW 150 - 130 -170 (NOTE 5)
255 COS-1(H) ROW 150 - 130 (NOTE 5)
445 COS-1(H) ROW 150 -140 - 130 (NOTE 5)
555, 745 FCC PART 31 ACCTS:521 THRU 523, 525, 526, 530 & 313-02 (NOTE 5)

REVENUE REQUIREMENT:

150 260 450 560 750 THE SUM OF DEPRECIATION + EXPENSE LESS DEPRECIATION + TAXES LESS FIT + NET RETURN + FIT + UNCOLLECTIBLE & MISCELLANEOUS REVENUES AND IDC FOR EACH OF THE ROWS. (NOTE 4)

ACCESS SERVICE REVENUES:

155 SAME AS COS-4, ROW 150
265 ACTUAL ACCESS REVENUE
455 SAME AS COS-4, ROW 450
565 ACTUAL ACCESS REVENUE
755 SAME AS COS-4, ROW 750

TELEPHONE PLANT IN SERVICE:

160 SAME ACCOUNTS AS:COS-1(P), ROW 450
270 COS-1(H), ROW 450
460 COS-1(H), ROW 450
570, 760 FCC PART 31 ACCTS: 100.1

RATE BASE ADJUSTMENTS

170 SAME ACCOUNTS AS: COS-1(P), ROW 530 -590+540+560+550
280 COS-1(H), ROW 530 -590+540+560+550
470 COS-1(H), ROW 530 -590+540+560+550
580, 770 FCC PART 31 ACCTS: TOTAL OTHER INVESTMENTS LESS SELECTED INVESTMENT RESERVES (NOTE 6)

FILING ENTITY: ANY COMPANY

RTE - 3
PAGE 1 OF 1

ANNUALIZED
ACCESS PRICEOUT
COMPARISONS
(DOLLARS IN THOUSANDS)

		Revenue at Effective Rate 1/1/88	Revenue at Effective Rate 12/1/88	Change (B)-(A)	Revenue at Proposed Rate 1/1/89	Change (E)-(B)	Revenue at Proposed Rate 4/1/89	Change (F)-(B)
		(A)	(B)	(C)=B-A	(D)	(E)=D-B	(F)	(G)=F-B
100	Total Multi-Line Business End Usage (incl post 7/83 CTX)							
110	Total Residence and Single-Line Business Usage							
120	Centrex pre 7/83 usage							
130	Total CCL Usage							
140	Total TS-Switched (excl. BA)							
150	Total Special Access Usage							
160	Directory Assistance							

NOTES:

(1) Projected demand quantities for test year 1989 should be uniformly applied to different rate schedules to obtain price-outs.

(2) All non-recurring charges should be included. EA should also be included.

RATE ANALYSIS TABLE DESCRIPTIONS

RTE-2 SPECIAL ACCESS RATE ANALYSIS

ROW	DESCRIPTION
100 & 110	SPECIAL ACCESS VOICE GRADE 2-WIRE RATES ARE A COMPOSITE OF RATES THAT INCLUDE TWO CHANNEL TERMINATIONS AND X MILES OF SPECIAL TRANSPORT (0 AND 10 MILES RESPECTIVELY: CT AND IOM). THE RATES SPECIFICALLY EXCLUDE VOICE SIGNALING CAPABILITY, SURCHARGE AND MESSAGE STATION EQUIPMENT RECOVERY CHARGE.
120 & 130	SPECIAL ACCESS VOICE GRADE 4-WIRE RATES ARE COMPOSITED IN THE SAME FASHION AS 2-WIRE ABOVE. 0 AND 10 MILES OF SPECIAL TRANSPORT ARE AGAIN USED.
140 THRU 210	SPECIAL ACCESS DIGITAL DATA RATES ARE COMPOSITES OF RATES THAT INCLUDE ONE CHANNEL TERMINATION AND X MILES OF TRANSPORT (0 AND 10 MILES). (NOTE 1)
220 & 230	SPECIAL ACCESS HI CAPACITY RATES ARE COMPOSITES OF RATES THAT INCLUDE ONE CHANNEL TERMINATION, X MILES OF TRANSPORT (0 AND 10 MILES) AND ONE DS 1 TO VOICE MULTIPLEXOR. RATES EXCLUDE SIGNALING, SURCHARGE AND MESSAGE STATION.
240 & 250	SPECIAL ACCESS DS-3 RATES ARE COMPOSITES OF RATES THAT INCLUDE ONE CHANNEL TERMINATION, X MILES OF TRANSPORT (0 AND 10 MILES), ONE DS-3 TO DS-1 MUX AND ONE DS-1 TO VOICE MUX. RATES EXCLUDE SIGNALING, SURCHARGE AND MESSAGE STATION.

NOTE 1: DIGITAL DATA SERVICES ARE DEFINED AS FOLLOWS:

DA1	2.4 KBPS
DA2	4.8 KBPS
DA3	9.6 KBPS
DA4	56.0 KBPS

NOTE 2: CARRIERS SHOULD NOT INCLUDE ICB RATES ON THIS TABLE

RATE ANALYSIS TABLE DESCRIPTIONS

RTE-3 ANNUALIZED ACCESS PRICEOUT COMPARISONS

GENERAL: THIS TABLE PROVIDES A SHOWING OF THE REVENUE EFFECT OF PRICING OUT THE PROSPECTIVE TEST YEAR DEMAND AT FOUR DIFFERENT RATE LEVELS (RATES AS OF 1/1/88, 12/1/88, 1/1/89 AND PROPOSED RATES FOR 4/1/89).

COLUMN	DESCRIPTION
A	REVENUES AT EFFECTIVE RATE OF 1/1/88
B	REVENUES AT EFFECTIVE RATE OF 12/1/88
C	CHANGE - COL. B MINUS COL. A
D	REVENUES AT PROPOSED RATES FOR 1/1/89
E	CHANGE - COL. D MINUS COL. B
F	REVENUES AT PROPOSED RATES FOR 4/1/89
G	CHANGE - COL. F MINUS COL. D

ROW	DESCRIPTION
100	TOTAL MULTI-LINE BUSINESS END USAGE (INCLUDING POST 7/83 CENTREX)
110	TOTAL RESIDENCE AND SINGLE-LINE BUSINESS USAGE
120	CENTREX PRE 7/83 USAGE
130	TOTAL CCL USAGE
140	TOTAL TS-SWITCHED (EXCL. DA)
150	TOTAL SPECIAL ACCESS USAGE
160	TOTAL DIRECTORY ASSISTANCE USAGE

NOTES

1. PROJECTED DEMAND QUANTITIES FOR TEST YEAR 1989 SHOULD BE UNIFORMLY APPLIED TO DIFFERENT RATE SCHEDULES TO OBTAIN PRICE-OUTS.

2. ALL NON-RECURRING MISCELLANEOUS AND ICB CHARGES SHOULD BE INCLUDED. EQUAL ACCESS SHOULD ALSO BE INCLUDED.

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